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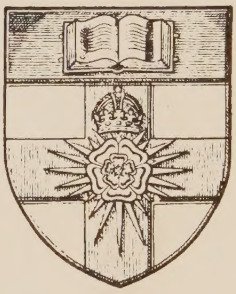

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Addyman, Beckett *v.*	(C. A.)	783
Allcock *v.* Moorhouse	(C. A.)	366
Allum *v.* Dickinson	(C. A.)	632
Austin, Hunt *v.*	(C. A.)	598

B.

		PAGE
Babbage *v.* Coulbourn		235
Bailey, Belper School Attendance Committee *v.*		259
Baldwin *v.* London, Chatham, and Dover Railway Company		582
Bank of England, Suffell *v.*	(C. A.)	555
Beatty *v.* Gillbanks		308
Beckett *v.* Addyman	(C. A.)	783
Belper School Attendance Committee *v.* Bailey		259
Berks (Justices of), Coomber *v.*		17
Bexley Local Board *v.* West Kent Sewerage Board		518
Birmingham Dairy Company, Parsons *v.*		172
Blackmore *v.* Vestry of Mile End Old Town	(C. A.)	451
Bobbett *v.* South Eastern Railway Company		424
Bridgett, Turner *v.*	(C. A.)	55
Bridgnorth (Guardians of), Reg. *v.*		765
Brighton Sewers Act, Re		723
Brown *v.* Great Western Railway Company	(C. A.)	744
——— *v.* Manchester and Sheffield Railway Company		230
——— *v.* North	(C. A.)	52
Burr, Cory *v.*	(C. A.)	463

C.

		PAGE
Capell *v.* Great Western Railway Company		459
Cassaboglou *v.* Gibbs		220
Cato *v.* Thomson	(C. A.)	616
Chapman, In re		254
Chard *v.* Jervis	(C. A.)	178

	PAGE
Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Company	118
Chittick, Mears *v.*	35
Clack *v.* Wood (C. A.)	276
Clark *v.* Cullen	355
Clarkson *v.* Musgrave	386
Cookham Union, Reg. *v.*	522
Coomber *v.* Justices of Berks	17
Cooper, Titterton *v.* (C. A.)	473
Cory *v.* Burr (C. A.)	463
Coulburn, Babbage *v.*	235
Cox *v.* Great Western Railway Company	106
Crawford, Saunders *v.*	612
Cullen, Clark *v.*	355

D.

Davies *v.* Evans	238
Davison *v.* Donaldson	623
Dickinson, Allum *v.* (C. A.)	632
Dobbs *v.* Grand Junction Waterworks Company	151
Donaldson, Davison *v.*	623
Dudley (Earl of), Griffiths *v.*	357
Dyott, Reg. *v.*	47

E.

Eaton *v.* Western (C. A.)	636
Emanuel & Co., In re	408
Evans, Davies *v.*	238
Eynde *v.* Gould	335

F.

Farrer, Thompson *v.* (C. A.)	372
Flower *v.* Sadler	83
Ford *v.* Kettle (C. A.)	139
Forwood *v.* North Wales Insurance Company (C. A.)	732

G.

Ganz, Reg. *v.*	93
Gibbs, Cassaboglou *v.*	220
——— *v.* Guild (C. A.)	59
Gillbanks, Beatty *v.*	308
Goddard *v.* O'Brien	37
Gordon *v.* Jennings	45
Gould, Eynde *v.*	335
Graham, Newport Urban Sanitary Authority *v.*	183
Grand Junction Waterworks Company, Dobbs *v.*	151
Graves *v.* Terry	170
Great Eastern Railway Company, Board of Works for Hackney *v.* (C. A.)	412
———————————, Pulling *v.*	110
Great Nothern Railway Company, Vicary *v.*	168
Great Western Railway Company, Brown *v.* (C. A.)	744
———————————, Capell *v.*	459
———————————, Cox *v.*	106
Griffiths *v.* The Earl of Dudley	357
Guild, Gibbs *v.* (C. A.)	59

H.

Hackney Board of Works *v.* Great Eastern Railway Company (C. A.)	412
Hammond, Jennings *v.*	225
Harding *v.* Preece	281
Harris *v.* Truman (C. A.)	264
Heath *v.* Roberts	137
Heaven *v.* Pender	302
Hedges, Ivay *v.*	80
Hetherington *v.* North Eastern Railway Company	160
Hodgson *v.* Railway Passengers' Assurance Company	188
Hull, In re	689
Hunt *v.* Austin (C. A.)	598
Hughes, Percival *v.* (C. A.)	441
Hyde, Stone *v.*	76

		PAGE
I.		
Inglis, Stock *v.*		708
Ivay *v.* Hedges		80
J.		
Jack *v.* Kipping		113
James, Neilson *v.*	(C. A.)	546
Jenkins *v.* Jones		128
Jennings, Gordon *v.*		45
——— *v.* Hammond		225
Jervis, Chard *v.*	(C. A.)	178
Jones, Jenkins *v.*		128
K.		
Keal, Smith *v.*	(C. A.)	340
Kettle, Ford *v.*	(C. A.)	139
Kipping, Jack *v.*		113
L.		
Lambeth Assessment Committee, Smith *v.*		585
Law Society of the United Kingdom *v.* Shaw	(C. A.)	1
——— *v.* Waterlow	(C. A.)	1
Lee, Reg. *v.*		394
——, Webber *v.*		315
Leigh *v.* Wrigley		397
Livingstone, Price *v.*	(C. A.)	679
Local Government Board, Reg. *v.*		600
London, Chatham, and Dover Railway Company, Baldwin *v.*		582
Longshaw, Warrington Waterworks Company *v.*		145
Looker *v.* Wrigley		397
M.		
Manchester and Sheffield Railway Company, Brown *v.*		230
Mansfield (Guardians of) *v.* Wright	(C. A.)	683
Maidenhead (Mayor, &c., of), Reg. *v.*	(C. A.)	494
Mapleson, Quilter *v.*	(C. A.)	672
Martin, Wall *v.*		727
Maspons y Hermano *v.* Mildred	(C. A.)	530
Mears *v.* Chittick		35
Mercier, Williams *v.*		337
Mersey Steel and Iron Company *v.* Naylor		648
Metropolitan Asylum District (Managers of), Weston *v.*	(C. A.)	404
Middlesex (Justices of), Reg. *v.*		41
——— (Clerk of the Peace for), Prison Commissioners *v.*	(C. A.)	506
Mildred, Maspons y Hermano *v.*	(C. A.)	530
Mile End Old Town (Vestry of), Blackmore *v.*	(C. A.)	451
Miller *v.* Pilling	(C. A.)	736
Moorhouse, Allcock *v.*	(C. A.)	366
Morgan *v.* Thomas	(C. A.)	643
Morton *v.* Palmer		89
Mostyn *v.* Stock		432
Musgrave, Clarkson *v.*		386
N.		
Naylor, Mersey Steel and Iron Company *v.*		648
Neilson *v.* James	(C. A.)	546
Ness *v.* Stephenson		245
Netherlands India Steam Navigation Company, Chartered Mercantile Bank of India *v.*		118
Newport Urban Sanitary Authority *v.* Graham		183
North, Brown *v.*	(C. A.)	52
North Eastern Railway Company, Hetherington *v.*		160
North Wales Insurance Company, Forwood *v.*	(C. A.)	732

PAGE

O.

O'Brien, Goddard *v.* 37

P.

Palmer, Morton *v.* 89
Parsons *v.* Birmingham Dairy Company 172
Pearce *v.* Scotcher 162
Pender, Heaven *v.* 302
Penwarden *v.* Roberts 137
Percival *v.* Hughes (C. A.) 441
Pilling, Miller *v.* (C. A.) 736
Pitman *v.* Universal Marine Insurance Company 192
Preece, Harding *v.* 281
Price *v.* Livingstone (C. A.) 679
Prison Commissioners *v.* Clerk of the Peace for Middlesex (C. A.) 506
Pulling *v.* Great Eastern Railway Company 110

Q.

Quilter *v.* Mapleson (C. A.) 672

R.

Railway Passengers' Assurance Company, Hodgson *v.* 188
Reg. *v.* Bishop of St. Albans (C. A.) 454
—— *v.* Bridgnorth (Guardians of) 765
—— *v.* Cookham Union 522
—— *v.* Dyott 47
—— *v.* Ganz 93
—— *v.* Middlesex (Justices of) 41
—— *v.* Lee 394
—— *v.* Local Government Board 600
—— *v.* Maidenhead (Mayor of) (C. A) 494

PAGE

Reg. *v.* Sheward (C. A.) 741
—— *v.* Weil (C. A.) 701
Roberts, Heath *v.* 137
———, Penwarden *v.* 137
———, Wilson *v.* 137

S.

Sadler, Flower *v.* 83
St. Albans (Bishop of), Reg. *v.* (C. A.) 454
Saunders *v.* Crawford 612
Scotcher, Pearce *v.* 162
Shaw, Law Society of the United Kingdom *v.* (C. A.) 1
Sheward, Reg. *v.* (C. A.) 741
Shubrook *v.* Tufnell (C. A.) 621
Smith *v.* Keal (C. A.) 340
—— *v.* Lambeth Assessment Committee 585
Stephenson, Ness *v.* 245
South Eastern Railway Company, Bobbett *v.* 424
———, Thomson *v.* (C. A.) 320
Stock *v.* Inglis 708
———, Mostyn *v.* 432
Stone *v.* Hyde 76
Stringer, Ex parte 436
Suffell *v.* Bank of England (C. A.) 555

T.

Taylor, Wall *v.* 727
Terry, Graves *v.* 170
Titterton *v.* Cooper (C. A.) 473
Thomas, Morgan *v.* (C. A.) 643
Thompson *v.* Farrer (C. A.) 372
Thomson, Cato *v.* (C. A.) 616
———— *v.* South Eastern Railway Company (C. A.) 320
Truman, Harris *v.* (C. A.) 264
Tufnell, Shubrook *v.* (C. A.) 621
Turner *v.* Bridgett (C. A.) 55

PAGE

U.

Universal Marine Insurance Company, Pitman *v.* 192

V.

cary *v.* Great Northern Railway Company 168

W.

Walker & Son & Brown, In re an Arbitration between 434
———, Williams *v.* 576
Wall *v.* Martin 727
—— *v.* Taylor 727
Warrington Waterworks Company *v.* Longshaw 145
Waterlow, Law Society of the United Kingdom *v.* (C. A.) 1
Webber *v.* Lee 315
Weil, Reg. *v.* (C. A.) 701
West Kent Sewerage Board, Bexley Local Board *v.* 518
Western, Eaton *v.* (C. A.) 636
Weston *v.* Managers of the Metropolitan Asylum District (C. A.) 404
Williams *v.* Mercier (C. A.) 337
———— *v.* Walker 576
Wilson *v.* Roberts 137
Wood, Clack *v.* (C. A.) 276
Wright, Mansfield (Guardians of) *v.* (C. A.) 683
Wrigley, Leigh *v.* 397
———, Looker *v.* 397

TABLE OF CASES CITED.

A.

		PAGE
Abergavenny (Earl of) *v.* Brace	Law Rep. 7 Ex. 175	428, 429
Adams *v.* Margate Pier Company	12 Q. B. 217; 15 Sim. 181	729
Albion Steel and Wire Company	7 Ch. D. 547	654
Aldous *v.* Cornwell	Law Rep. 3 Q. B. 573	557
Allan *v.* Liverpool	8 Q. B. D. 195	247, 248
——- *v.* Overseers of Liverpool	Law Rep. 9 Q. B. 180	593, 596
Allday *v.* Great Western Railway Company	5 B. & S. 903	233
American Insurance Company *v.* Dunham	12 Wendell N. Y. Rep. 463; 15 Wendell, 9	465, 466, 469
Anderson's Case	Law Rep. 3 Eq. 337	668
Anderson *v.* Morris	Law Rep. 10 C. P. 58; Ex. Ch. 609; Law Rep. 1 App. Cas. 713	720, 722
Andrew *v.* Boughey	Dyer, 75a	38
Anonymous Case	1 Salk. 395	456
Arcangelo *v.* Thomson	2 Camp. 620	465, 467
Armstrong *v.* Stokes	Law Rep. 7 Q. B. 598	626, 628
——-—— *v.* ———	Law Rep. 7 Q. B. 598, at p. 603	536, 537, 539, 541, 542
Arnett *v.* London and North Western Railway Company	20 L. T. 80	415
Ashenden *v.* London, Brighton, and South Coast Railway Company	5 Ex. D. 190	233
Association of Land Financiers, In re	16 Ch. D. 373	654
Atwood *v.* Sellar	5 Q. B. D. 286	193
Attorney General *v.* London and North Western Railway Company	5 Ex. D. 247	764

B.

Bacon *v.* Cosby	4 De G. & Sm. 261	644
Baily *v.* De Crespigny	Law Rep. 4 Q. B. 180	639
Banne, The	Davis, 55, 56	165, 167
Barker *v.* Braham	2 Wm. Black, 866	346, 348
Barned's Banking Company, In re. Contract Corporation, Ex parte The	Law Rep. 3 Ch. 105	665
Barnes *v.* Chipp	3 Ex. D. 176.	175
Barnett *v.* Brandao	6 M. & Gr. 630	537
———, Ex parte	Law Rep. 9 Ch. 293	657
Bear *v.* Bromley	18 Q. B. 271	226
Bellchamber *v.* Giani	3 Madd. 550	550

		PAGE
Bell *v.* Crane	Law Rep. 8 Q. B. 481, 482	240
Bent *v.* Roberts	3 Ex. D. 66	23, 24, 27
Betts *v.* Great Eastern Railway Company	3 Ex. D. 182	426
Black *v.* Ottoman Bank	8 Jur. (N.S.) 801	687
Blair *v.* Bromley	5 Hare, 542; on appeal, 2 Phill. 359; 16 L. J. (Ch.) 495	61, 71, 72
Blake *v.* Blake	7 P. D. 102	141
Blakemore *v.* Bristol and Exeter Railway Company	8 E. & B. 1035	304
Bland *v.* Lipscombe	Note to Race *v.* Ward, 4 E. & B. 713; 24 L. J. (Q.B.) 155, n.	165
Blandy, Ex parte. Foster, In re	1 Deacon, 286	48
Bloomfield *v.* Johnston	Ir. Rep. 8 C. L. 68	166
Blyth *v.* Shepherd	9 M. & W. 763	465
Bodenham *v.* Hoskins	21 L. J. (N.S.) (Ch.) 864	538
Bond *v.* Hopkins	1 Sch. & Lef. 428	64
Booth *v.* Lord Warrington	4 Bro. P. C. 163	61, 62, 63, 64, 70, 71, 72, 73, 74
Bower *v.* Peate	1 Q. B. D. 321	444, 445, 448, 449, 450
Bowles *v.* Round	5 Ves. 508	617
Bowring *v.* Shepherd	Law Rep. 6 Q. B. 309	549
Bradley *v.* Baylis	8 Q. B. D. 195	252, 253, 254
Bradshaw *v.* Davenport	8 Coke, 144	301
——— *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 C. P. 189	111, 112, 360
Brand *v.* Hammersmith Railway Company	Law Rep. 4 H. L. 171	742, 743
Bree *v.* Holbeck	2 Dougl. 654	61, 62
Breedon *v.* Gill	5 Mod. 269	605
Brighton (Mayor of) *v.* Guardians of the Poor of Brighton	5 Ch. D. 368	429
Bristow *v.* Cormican	10 Ir. Rep. C. L. 398; 3 App. Cas. 641	166, 167
Brook *v.* Dawson	20 L. T. 611	639
——, Ex parte. Roberts, In re	10 Ch. D. 100, at p. 105	479
Brooks *v.* MacDonnell	1 Y. & C. 500	193
Brown *v.* Howard	2 B. & B. 73	62
Buccleugh (Duke of) *v.* Metropolitan Board of Works	Law Rep. 5 H. L. 418	743
Budd *v.* Marshall	5 C. P. D. 481	634
Bulstrode *v.* Hall	1 Sid. 148	166
Burchfield *v.* Moore	3 E & Bl. 683; 23 L. J. (Ex.) 276	557
Burns *v.* Nowell	5 Q. B. D. 444	373
Buse *v.* Roper	41 L. T. (N.S.) 457	57
Butler *v.* Hunter	7 H. & N. 826	445

C.

Cahill *v.* Dawson	3 C. B. (N.S.) 106	537
Caldwell *v.* Parker	Ir. Rep. 3 Eq. 519, at p. 526	558, 565, 571, 572
Caledonian Railway Company *v.* Guild	1 Sc. Dec. (4th Series), 198	751
——— *v.* North British Railway Company	6 App. Cas. 122	297
Castle *v.* Playford	Law Rep. 5 Ex. 165; Law Rep. 7 Ex. 98	721

		PAGE
Calvert *v.* Baker	4 M. & W. 417	557
Campbell's Case	4 Ch. D. 470, 475	653
Cartwright *v.* Glover	2 Giff. 620	477, 478
Catton *v.* Simpson	8 A. & E. 136	557
Cefn Cilcen Mining Company, In re	Law Rep. 7 Eq. 88	400
Chamberlain *v.* Williamson	2 M. & S. 408	111
Chance *v.* Adams	1 Ld. Raym. 77	33
Chapman *v.* Royal Netherlands Steam Navigation Company	4 P. D. 157	653
Childers *v.* Wooler	2 E. & E. 287	341, 343, 349
City of Glasgow Union Railway Company *v.* Hunter	Law Rep. 2 H. L., Sc., 78	743
Clark *v.* Hougham	2 B. & C. 149	61
—— *v.* Dumfries Commissioners of Supply	7 Sc. Sess. Cas. 4th Series, 1157	23, 25, 30, 31, 34
Clipperton, In re	12 Q. B. 687	409, 410
Cobbett *v.* Warner	Law Rep. 2 Q. B. 108	92
Coles *v.* Bristowe	Law Rep. 4 Ch. 3	554
Collett *v.* Foster	2 H & N. 356	344, 345, 346, 347, 348
Collins *v.* Evans	5 Q. B. 820	341, 349
—— *v.* Prosser	1 B. & C. 682	558
—— *v.* Vestry of Paddington	5 Q. B. D. 368	622
Collis *v.* Selden	Law Rep. 3 C. P. 495	304
Cordwell *v.* Martin	1 Camp. 81	558
Cory *v.* Bristow	Law Rep. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262	592, 595
Cook *v.* Field	15 Q. B. 460	132
—— *v.* Hathway	Law Rep. 8 Eq. 612	89
—— *v.* Ipswich Board of Health	Law Rep. 6 Q. B. 451	604
Counhaye, In re	Law Rep. 8 Q. B. 410	99, 105
Coventry *v.* Windal	Browne, 67	640, 642
Coverdale *v.* Charlton	4 Q. B. D. at p. 121	416
Creighton *v.* Rankin	7 Cl. & F. 325	687
Cronshaw *v.* Chapman	7 H. & N. 911; 31 L. J. (Ex.) 277	341, 349
Cruse *v.* Paine	Law Rep. 4 Ch. 441, at p. 443	554
Cumber *v.* Wane	Str. 426	38, 39, 40
Czech *v.* General Steam Navigation Company	Law Rep. 3 C. P. 14	119, 124

D.

Dale's Case	6 Q. B. D. 376	704
Dalton *v.* Angus	6 App. Cas. 829	445, 448
Dare Valley Railway Company, In re	Law Rep. 4 Ch. 554	520
Davidson *v.* Cooper	13 M. & W. 343; 13 L. J. (Ex.) 276	557, 562
Davies *v.* Felix	4 Ex. D. 32	278
Davis *v.* Goodman	5 C. P. D. 128	138, 141
Dawson *v.* Fitzgerald	1 Ex. D. 257.	236, 237
Day *v.* Day	Law Rep. 3 P. C. 751	427
De Begnis *v.* Armistead	10 Bing. 170	226
De Bussche *v.* Alt	8 Ch. D. 286	538
Dewhurst, Ex parte	Law Rep. 7 Ch. 185	181
Dixon, Ex parte	4 Ch. D. 133	544
Dodds *v.* Shepherd	1 Ex. D. 75	56, 57

		PAGE
Doe *v.* Simpson	4 Bing. (N.C.) 333	644
—— *v.* Webber	1 B. & Ad. 713	644
—— d. Williams *v.* Evans	1 C. B. 717	131, 132, 134, 135
Dressler, Ex parte. Solomon, In re	9 Ch. D. 252	479, 481, 489, 493
Dudden *v.* Long	1 Bing. (N.C.) 299	342
Dunkirk Colliery Company *v.* Lever	9 Ch. D. 20 at p. 28, per Bramwell, L.J.	737
Dyson *v.* Wood	3 B. & C. 449	498

E.

East London Union (Guardians of) *v.* Metropolitan Railway Company	Law Rep. 4 Ex. 309	461
East and West India Dock Company, Ex parte	17 Ch. D. 759	282, 295, 266
—— *v.* Hill	W. N. April 29, 1882	282
Ecclesiastical Commissioners for England *v.* North Eastern Railway Company	4 Ch. D. 845	62
Egan *v.* Morris	H. & G. temp. Plunkett, 297	644
Elbinger Actien Gessellschaft *v.* Clay	Law Rep. 8 Q. B. 313	536, 539, 541
Electric Telegraph Company *v.* Salford (Overseers)	11 Ex. 181	593
Elliott *v.* Johnson	Law Rep. 2 Q. B. 120	370
Ellis *v.* Sheffield Gas Consumers Company	2 E. & B. 767	446
Ernest *v.* Brown	4 Bing. (N.C.) 162	499
Esdaile *v.* Visser	13 Ch. D. 421	180, 181, 182

F.

Farebrother *v.* Gibson	1 De G. & J. 602	617, 619
Feise *v.* Wray	3 East. 93	221
Ferrers, Earl *v.* Stafford and Uttoxeter Railway Company	Law Rep. 13 Eq. 524	461
Finney *v.* Godfrey	Law Rep. 8 Eq. 356	49, 50, 59
Fish *v.* Kempton	7 C. B. 687	544
Folkard *v.* Metropolitan Railway Company	Law Rep. 1 C. P. 471	36
Francis *v.* Cockrell	Law Rep. 5 Q. B. 184, 501	304
Frank *v.* Stovin	3 East. 548	644
Franklin *v.* South Eastern Railway Company	3 H. & N. 211	161
Freeth *v.* Burr	Law Rep. 9 C. P. 208	652, 657, 658, 665, 666, 670

G.

Gallatti *v.* Wakefield	4 Ex. D. 249	434, 435
Garbutt, Ex parte	2 Bing. 74; 9 B. Moo. 157	6
Gardner *v.* Walsh	5 E. & Bl. 83; 24 L. J. (Q.B.) 285	557
Garnett *v.* Bradley	3 App. Cas. 944	56, 57
Garton *v.* Bristol & Exeter Railway Company	30 L. J. (Q.B.) 273	750, 755
Gayford *v.* Nicholls	9 Ex. 702	445

		PAGE
George *v.* Clagett	2 Sm. L. C. 118	544
——— *v.* Skivington	Law Rep. 5 Ex. 1	304, 305, 306, 307
Gibson *v.* Kirk	1 Q. B. 850	369
Glenister *v.* Great Western Railway Company	29 L. T. (N.S.) 423	232
Goddard *v.* Thompson	47 L. J. (Q.B.) 382	90
Goldschmidt *v.* Whitmore	3 Taunt. 508	465
Goodwin *v.* Noble	8 E. & B. 587, at p. 602	477, 478
Grant *v.* Holland	3 C. P. D. 180	90
Gray *v.* Raper	Law Rep. 1 C. P. 604	652
Greaves, In re. Bray *v.* Tofield	18 Ch. D. 551	61
Grece *v.* Hunt	2 Q. B. D. 389	604, 608
Green *v.* Elmslie	1 Peake, 278	466
Greene *v.* Reece	8 C. B. 88	6
Grill *v.* General Iron Steam Collier Company, Limited	Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476	119, 123

H.

Hadley *v.* Baxendale	9 Ex. 341	583
Hahn *v.* Corbett	2 Bing. 205	465
Halley, The	Law Rep. 2 P. C. 193	119
Hamilton *v.* Vestry of St. George, Hanover Square	Law Rep. 9 Q. B. 42	452
Hardy *v.* Atherton	7 Q. B. D. 264 ..	239, 240, 241, 242
Hare *v.* Travis	7 B. & C. 14	199
Hargreaves *v.* Diddams	Law Rep. 10 Q. B. 582	166
Harmer *v.* Bean	3 C. & K. 307	498
Harper, In re	Law Rep. 18 Eq. 539	520
——— *v.* Scrimgeour	5 C. P. D. 366	180, 181
Hartley *v.* Hudson	4 C. P. D. 367	634
Hastings *v.* Wilson	Holt N. P. C. 290	481, 485
Havelock *v.* Hancill	3 T. R. 277	465, 466, 469, 471
Haydon's Case	3 Coke's Rep. 7	298
Heald *v.* Kenworthy	10 Ex. 739	626, 627, 629, 631
Henderson *v.* Peruvian Railway Company	16 L. T. (N.S.) 297	652
Henfree *v.* Bromley	6 East, 308	558, 562
Hesketh *v.* Atherton Local Board	Law Rep. 9 Q. B. 4, 7	608
Hey *v.* Neve	2 Shaw, Scotch App. Cas. 395.	125
Heyman *v.* Parish	2 Camp. 149	465
Hicks *v.* Faulkner	8 Q. B. D. 167	373
Higgins *v.* Harding	Law Rep. 8 Q. B. 7	414, 415
Hill *v.* Kirkwood	28 W. R. 358; 42 L. T. 105	138
Hinks, In re. Bertheir, Ex parte	7 Ch. D. 882	433
Hoare *v.* Dickson	7 C. B. 164.	92
——— *v.* Rennie	5 H. & N. 19	655, 658, 666, 671
Hole *v.* Sittingbourne Railway Company	6 H. & N. 488	448
Honck *v.* Muller	7 Q. B. D. 92	652, 655, 657, 658, 666, 670
Hooper *v.* London and North Western Railway Company	5 L. J. (Q.B.) 103	584
Hopkins, In re	18 Ch. D. 370	654
Hovenden *v.* Lord Annesley	2 Sch. & Lef. 630	61, 62, 64, 71
Howell *v.* Metropolitan District Railway Company	19 Ch. D. 508	461
Howes *v.* Young and Howes *v.* Stone	1 Ex. D. 146	433
Hubbersty *v.* Manchester, Sheffield, and Lincolnshire Railway Company	Law Rep. 2 Q.B. 59, 471	437, 438, 439

		PAGE
Hudson *v.* Bilton	6 E. & B. 565	681
——— *v.* Macrae	4 B. & S. 585; 33 L. J. (M.C.) 65	166
Humphrys *v.* Pratt	5 Bli. (N.S.) 154	341
Hunt *v.* Remnant	9 Ex. 635	131
—— *v.* Bishop	8 Ex. 675	131
Hunter *v.* Gibbons	1 H. & N. 459; 26 L. J. (Ex.) 1 60, 61, 62, 63, 64, 66, 69, 73	
Hussey *v.* Horne Payne	4 App. Cas. at p. 322	278
Hutton *v.* Bullock	Law Rep. 8 Q. B. 331	541

I.

Illinois Central Railway Company *v.* M'Clellan	5 Ill. Rep. (American) 58	583
Imperial Gas Company *v.* London Gas Company	10 Ex. 39; 23 L. J. (Ex.) 303 60, 61, 63, 66, 69, 73	
Ince Hall Rolling Mills Company *v.* Douglas Forge Company	8 Q. B. D. 179	669
Indermaur *v.* Dames	Law Rep. 1 C. P. 294; Law Rep. 2 C. P. 311 81, 303, 304, 306	
Inglis *v.* McDougal	1 B. M. 196	299
Ireland *v.* Livingston	Law Rep. 5 Q. B. 516; Law Rep. 5 H. L. 395 220, 222	
Irvine *v.* Watson	5 Q. B. D. 414	537, 541, 544
——— *v.* ———	5 Q. B. D. 102	626, 627, 631

J.

Jackson *v.* Litchfield	8 Q. B. D. 474	355, 356
James, Ex parte	Law Rep. 8 Eq. 225	668
Jarman *v.* Hooper	6 M. & G. 827 341, 342, 343, 345, 348, 349, 351, 354	
Jenkins *v.* Davies	1 Ch. D. 696	171
Johnston *v.* Kershaw	Law Rep. 2 Ex. 82	222
Jones *v.* Victoria Graving Dock Company	2 Q. B. D. 314, 327	622
Jupp *v.* Cooper	5 C. P. D. 26	335, 336

K.

Kaltenbach *v.* Mackenzie	3 C. B. D. 467	193
Kavanagh *v.* Morland	2 Kay, 16	647
Keen *v.* Millwall Dock Company	8 Q. B. D. 482	389
Kellock's Case	Law Rep. 3 Ch. 769	653, 654, 669
Kershaw *v.* Cox	3 Esp. 246	557
King *v.* Burchell	Amb. 379	644
King, Re	1 Ad. & E. 560	6
Kingston, Ex parte	Law Rep. 6 Ch. 632	538
Kirby *v.* Biffen	8 Q. B. D. 195, at p. 221	247
Kittow *v.* Liskeard Union	Law Rep. 10 Q. B. 7	592, 595
Kleinwort *v.* Shepard	1 E. & E. 447, 28 L. J. (Q.B.) 147	465, 468, 470
Knight *v.* Faith	15 Q. B. 649 193, 198, 199, 209, 211, 216	
Knill *v.* Williams	10 East, 431	557, 573
Knox *v.* Gye	Law Rep. 5 H. L. 656	60
Kymer *v.* Suwercropp	1 Camp. 109	626, 631

L.

		PAGE
Lancashire, Justices of *v.* Cheetham	Law Rep. 3 Q. B. 14	25, 30
——— *v.* Overseers of Stretford	E. B. & E. 225	25
Langridge *v.* Levy	2 M. & W. 519 4; M. & W. 337	304, 305, 306
Lanyon *v.* Blanchord	2 Camp. 596	541, 544
Lee *v.* Nuttall	12 Ch. D. 61	656
Leggott *v.* Great Northern Railway Company	1 Q. B. D. 599	111, 112, 360, 368
Legh *v.* Lillie	6 H. & N. 165	406
Lemaitre *v.* Davis	19 Ch. D. 281	446
Levi *v.* Abbott	4 Ex. 590	341, 343, 345, 348, 349
Lewis *v.* Great Western Railway Company	3 Q. B. D. 195	232
Leyland *v.* Illingworth	2 D. F. & J. 248	617, 619
Lidgett *v.* Secretan	Law Rep. 6 C. P. 616	193, 197, 198, 199, 201, 209, 216, 217, 218
Lindsay *v.* Gladstone	Law Rep. 9 Eq. 132	8
——— *v.* Limbert	12 B. Moore, 209	481
Liverpool Loan Company Ex parte, Bullen In re	Law Rep. 7 Ch. 732	433
Livie *v.* Janson	12 East, 648	197, 465
Lloyd *v.* General Iron Screw Collier Company, Limited	3 H. & C. 284	119, 123, 126
Lloyd *v.* Guibert	Law Rep. 1 Q. B. 115	119, 122
Llynvi Coal and Iron Company, Ex parte	Law Rep. 7 Ch. 28	298
Lock *v.* Furze	Law Rep. 1 C. P. 441	132
Lockey *v.* Lockey	Prec. in Ch. 518	60
Lockier *v.* Paterson	1 C. & K. 271	111
Lohre *v.* Aitchison	2 Q. B. D. 501	193, 202, 207, 208, 210, 213
London, &c. (Mayor of) *v.* Cox	Law Rep. 2 H. L. 239	605
London and Brighton Railway Company *v.* St. Giles, Camberwell	4 Ex. D. 239	413, 414, 415, 418, 419, 420, 421
London and North Western Railway Company *v.* Buckmaster	Law Rep. 10 Q. B. 70, 444	430, 431, 592, 596
——— *v.* St. Pancras	17 L. T. (N.S.) 654	414, 415
——— *v.* St. Pancras Vestry	17 L. J. 654	187
London School Board *v.* St. Mary, Islington	1 Q. B. D. 65	186, 187
Longmeid *v.* Holliday	6 Ex. 761	304, 307
Lowe *v.* Peers	4 Burr. 2228	405
Lowrey *v.* Barker	5 Ex. D. 170	479
Lumsden *v.* Winter	8 Q. B. D. 650	171, 172
Lyon *v.* Mitchell	1 Madd. 467	644

M.

Maanss *v.* Henderson	1 East, 335	541, 544
Mackintosh *v.* Haydon	Ry. & M. 362	557
Mackley *v.* Pattenden	1 B. & S. 178	478, 481
Mactaggart *v.* Watson	10 Bli. 618, 625; 3 Cl. & F. 525.	685
Malcolmson *v.* O'Dea	10 H. L. Cas. 619	166

		PAGE
Manchester (Mayor of) *v.* Chapman	37 L. J. (M.C.) 173	187
Mann *v.* Forrester	4 Camp. 60	538, 541
Manning *v.* Flight	3 B. & Ad. 211	299
Marianski *v.* Cairns	1 Macq. H. L. Sc. 212, 766	499
Markland, The	Law Rep. 3 A. & E. 340	325
Martano *v.* Mann	14 Ch. D. 419	53
Mason *v.* Bogg	2 M. & C. 433	653, 662
Master *v.* Miller	4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857	557, 558, 560, 561, 562, 570, 571, 572 573, 574
McFarlane *v.* Norris	2 B. & S. 783	543
McManus *v.* Lancashire and Yorkshire Railway Company	4 H. & N. 327	233
McMartin *v.* Hannay	10 Court of Sess. Cas. 3rd Series, p. 411	81, 82
McSwiney *v.* Royal Exchange Assurance Company	14 Q. B. 634	722
Medwin, Ex parte	1 E. & B. 609	456
Mellish *v.* Richardson	7 B. & C. 819	498
Mersey Docks and Harbour Board *v.* Cameron	11 H. L. C. 443	25, 31, 34
Meyer *v.* Dresser	16 C. B. (N.S.) 646, at p. 665	543
Milan, The	Lush. 388	125
Mill *v.* The Commissioner of the New Forest	18 C. B. 60	427
Mills *v.* East London Union	Law Rep. 8 C. P. 79	480
Mills *v.* Wilkins	6 Mod. 62	33
Mollett *v.* Wackerbath	5 C. B. 181	558
Montgomery *v.* Montgomery	3 J. & Lat. 47	644, 647
Morgan *v.* Rees	6 Q. B. D. 508	389, 392
Mortinson *v.* Cohen	Unreported	341, 342
Morton *v.* Palmer	51 L. J. (Q.B.) 7	247, 248, 249, 250, 251, 252, 254
Moyle *v.* Jenkins	51 L. J. (Q.B.) 112	78
Murphy *v.* Ryan	2 Ir. C. L. Rep. 143	165, 166

N.

National Mercantile Bank, Ex parte	15 Ch. D. 42	142
Nelson *v.* Liverpool Brewery Company	2 C. P. D. 311	305, 307
New Zealand Land Company *v.* Watson	7 Q. B. D. 374	536, 539, 542, 544
Newby *v.* Sharpe	8 Ch. D. 39	639
Noel *v.* Noel	13 Ch. D. 510	53
North Staffordshire Railway Company *v.* Dale	8 Q. B. 836; 27 L. J. (M.C.) 147	416
Northern Counties of England Fire Insurance Company, In re	17 Ch. D. 337	654
Norton *v.* London and North Western Railway Company	13 Ch. D. 268	429

O.

O'Farrell *v.* Stephenson	4 Ir. Law Rep. 715	284
Oldfield *v.* Cobbett	12 Beav. 91	92
Padstow Total Loss and Collision Association, In re	20 Ch. D. 137	226, 228

		PAGE
Paine *v.* Hutchison	Law Rep. 3 Ch. 388	554
Pannell *v.* Hurley	2 Coll. 241	538
Pare *v.* Hartshorn	23 W. R. 138.	498
Parson *v.* Lloyd	3 Wils. 341	348
Partridge *v.* Strange	Plow. 77	131, 134
Payne *v.* Rogers	2 H. Bl. 349	305
Peat *v.* Jones	8 Q. B. D. 147	652, 653, 656, 664, 671
—— *v.* —— & Co.	8 Q. B. D. 147	116
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 473	232
Pellas *v.* Neptune Marine Insurance Company	5 C. P. D. 34	656
Peele *v.* Merchants' Insurance Company	3 Mason, 27	196, 201
Phillips *v.* Caldcleugh	Law Rep. 4 Q. B. 159	617
——— *v.* Clark	2 C. B. (N.S.) 156	119, 124
——— *v.* Eyre	Law Rep. 6 Q. B. 1	119
——— *v.* Henson	3 C. P. D. 26	247, 248, 249, 250
———, In re	1 Q. B. D. 78	336
——— *v.* James	3 D. J. & S. 72	644
Phœnix Bessemer Steel Company, In re	4 Ch. D. 108	652, 658
Pigot's Case	11 Rep. 26	557, 559, 571, 572, 574
Powell *v.* Hyde	5 E. & B. 607; 2 L. J. (Q.B.) 65.	466, 468, 470
——— *v.* Jessopp	18 C. B. 336	316
Potter *v.* Metropolitan District Railway Company	30 L. T. (N.S.) 765	111
——— *v.* Ranken	Law Rep. 6 H. L. 83	193
Pretty *v.* Bickmore	Law Rep. 8 C. P. 401	305
Priestley *v.* Fowler	3 M. & W. 1	360, 365
Printing and Numerical Registering Company, In re	8 Ch. D. 535	654
Progress Insurance Company, Re	22 L. T. 430; 18 W. R. 722; 39 L. J. (Ch.) 496	654
Prosser *v.* Edmonds	1 Y. & C. (Ex.) 481	132
Pym *v.* Great Northern Railway Company	4 B. & S. 396	161

R.

Raggett *v.* Beaty	5 Bing. 243	644
Railway Steel and Plant Company, Ex parte	8 Ch. D. 183	656
Read *v.* Great Eastern Railway Company	Law Rep. 3 Q. B. 555.	359, 363, 365
Redford *v.* Birley	3 Stark N. P. 76	312
Reg. *v.* Barclay	8 Q. B. D. 306, 312	239, 240, 242, 243
—— *v.* Boteler	4 B. & S. 959	240
—— *v.* Burrow	34 J. P. 53	166, 167
—— *v.* Clerk	1 Salk. 377	699
—— *v.* Fall	1 Q. B. 636	499
—— *v.* Garland	Law Rep. 5 Q. B. 269	499
—— *v.* Handsley	8 Q. B. D. 383	395, 459
—— *v.* Huntingdon	4 Q. B. D. 522	395
—— *v.* Keith	24 L. J. (M.C.) 110	557
—— *v.* Maidstone Union	5 Q. B. D. 31	524, 526, 529
—— *v.* Manchester (Overseers of)	3 E. & B. 336	25
—— *v.* Marriott	12 Ad. & E. 779	49

		PAGE
Reg. *v.* Meyer	1 Q. B. D. 173	395
—— *v.* Milledge	4 Q. B. D. 332	395
—— *v.* Morrish	32 L. J. (M.C.) 245	593, 596
—— *v.* Neale	9 C. & P. 431.	312
—— *v.* Newport Local Board	3 B. & S. 341; 32 L. J. (M.C.) 97	186, 187
—— *v.* Smith	3 E. & E. 383; 30 L. J. (M.C.) 74	593
—— *v.* St. George's Union	Law Rep. 7 Q. B. 90	592
—— *v.* St. Martin's, Leicester	Law Rep. 2 Q. B. 493.	25, 34
—— *v.* St. Mary Abbots	12 Ad. & E. 824	593
—— *v.* Trumpington (Overseers of)	Law Rep. 6 Q. B. 56	595
—— *v.* Vincent	9 C. & P. 91	312, 313
—— *v.* Walsall (Overseers of)	3 Q. B. D. 457	623
—— *v.* Waddon (Overseers of)	Law Rep. 10 Q. B. 230	595
—— *v.* Wigan	1 App. Cas. 611	499
Rex *v.* Cartwright	4 T. R. 490	33
—— *v.* Churchill	4 B. & C. 750	593
—— *v.* Marks	3 East, 157	33
—— *v.* Pease	4 B. & Ad. 30	743
—— *v.* Worcestershire (Justices of)	11 Ad. & E. 57	25
Rhodes *v.* Airedale Drainage Commissioners	1 C. P. D. 380, 402	520, 521
——— *v.* Liverpool Commercial Investment Company	4 C. P. D. 425	388, 389, 392
Richards & Co., In re	11 Ch. D. 676	654, 656
Richards *v.* Suffield	2 Ex. 616	6
Rodd *v.* Fitzgerald	6 H. L. C. 823	644
Roe *v.* Grew	2 Wils. 322	644
Roelandts *v.* Harrison	9 Ex. 444	681
Rolfe *v.* Gregory	34 L. J. (Ch.) 274	62
Rolls *v.* Vestry of St. George's, Southwark	14 Ch. D. 785	452
Rooth *v.* North Eastern Railway Company	Law Rep. 2 Ex. 173	232
Rouch *v.* Hall	6 Q. B. D. 17	175
Royce *v.* Charlton	8 Q. B. D. 1	639, 640, 642
Rudge *v.* Bowman	Law Rep. 3 Q. B. 689.	548
Russell *v.* Smith	12 Q. B. 217	728, 729, 731
Rutter *v.* Tregent	12 Ch. D. 758	171

S.

Sanderson *v.* Symonds	1 B. & B. 426	558, 569, 572
Sankey Brook Coal Company *v.* Marsh	Law Rep. 6 Ex. 185	656, 669
Saunders *v.* Richardson	7 Q. B. D. 388	262
Scott *v.* Avery	5 H. L. C. 811	236
Seal *v.* Claridge.	7 Q. B. D. 516	138
Seear *v.* Cohen	45 L. T. 589	87
Semenza *v.* Brinsley	18 C. B. (N.S.) 467	544
Seymour *v.* Coulson	5 Q. B. D. 359	389, 392, 393
Sharpe *v.* Birch	8 Q. B. D. 111	140, 142
Sheffield Waterworks Company *v.* Bennett	Law Rep. 7 Ex. 409; Law Rep. 8 Ex. 196	147, 151, 154, 155, 158
Shelley's Case	1 Rep. 936	645
Sherwood *v.* Sutton	5 Mason, 133.	62

		PAGE
Shine *v.* Dillon	1 Ir. L. Rep. C. L. 277	369, 371
Sibbald *v.* Roderick	11 Ad. & E. 38	49
Sibree *v.* Tripp	15 M. & W. 23, 37; 15 L. J. (Ex.) 348	38, 39, 40
Sims, Ex parte. Grubb, In re	5 Ch. D. 375	433
Simons *v.* Great Western Railway Company	18 C. B. 805	232
Simpson *v.* Crippin	Law Rep. 8 Q. B. 14	652, 658, 666
Simmonds *v.* Taylor	4 C. B. (N.S.) 463; 27 L. J. (C.P.) 248	557, 574
Smalley *v.* Hardinge	7 Q. B. D. 524	282, 284
Smethurst *v.* Mitchell	28 L. J. (Q.B.) 241	626, 628
Smith *v.* Anderson	15 Ch. D. 247	226
——— *v.* London and St. Katherine Docks Company	Law Rep. 3 C. P. 326	303, 304, 306
——— *v.* Morgan	5 C. P. D. 337	656
——— *v.* Steele	Law Rep. 10 Q. B. 125	303, 306
——— *v.* St. Michaels	3 E. & E. 383	316
Smyth *v.* Anderson	7 C. B. 21	626
——— *v.* North	Law Rep. 7 Ex. 242	281, 282, 284, 297
Sneezum, In re. Davis, Ex parte	3 Ch. D. 463	479, 480, 488, 493
Sotheron *v.* Scott	6 Q. B. D. 518	239, 241, 242
South Sea Company *v.* Wymondsell	3 P. Wms. 143	62, 64, 72
Sparkes *v.* Marshall	2 Bing. N. C. 761	721
Spear *v.* Bodmin Union	49 L. J. (M.C.) 69	593
Stacey *v.* Lintell	4 Q. B. D. 291	239, 240, 242
Stamper *v.* Sunderland (Overseers of)	Law Rep. 3 C. P. 388	248
Stanley *v.* Hayes	3 Q. B. 105	132
Stephens, Ex parte	7 Ch. D. 127	282
Stephenson *v.* Higginson	3 H. L. C. 638	6, 8
Stewart *v.* Steele	5 Scott. N. R. 927	193, 197, 201, 213, 216, 218
St. Mary Magdalen, Oxford, President, &c., of the College of *v.* The Attorney-General	6 H. L. C. 189	427
Stockdale *v.* Dunlop	6 M. & W. 224	720
Stockton Malleable Iron Company, In re	2 Ch. D. 101	437, 438
Stooke *v.* Taylor	5 Q. B. D. 569	656
Strange *v.* Fooks	4 Giff. 408, 412	686
Stradling *v.* Morgan	Plow. 199	33
Streeter, Ex parte. Morris, In re	19 Ch. D. 216	56, 57
Suckley *v.* Delafield	2 Caines, 222	465
Sullivan *v.* Rivington	28 W. R. 372	737
Sykes *v.* Beadon	11 Ch. D. 170	226
——— *v.* North Eastern Railway Company	44 L. J. (C.P.) 191	161

T.

Tarry *v.* Ashton	1 Q. B. D. 314	81, 82
Tayler *v.* Waters	7 Taunt. 374	316, 317, 318
Teasdale *v.* Braithwaite	4 Ch. D. 85; 5 Ch. D. 630	580
Thomas *v.* Patent Lionite Company	17 Ch. D. 250	656
——— *v.* Sorrell	Vaugh. 330	316
Thompson *v.* Davenport	2 Sm. L. C. 390, 8th Ed.	541
——— *v.* Hopper	E. B. & E. 1038	126

		PAGE
Thompson *v.* Thompson	27 L. J. (P. & M.) 65	527, 528
——— *v.* Ward	Law Rep. 6 C. P. 327, 360	248
Tidmarsh *v.* Grover	1 M. & S. 735	557
Toby, In re	12 Q. B. 694	409, 410
Todd *v.* Flight	9 C. B. (N.S.) 377; 30 L. J. (C.B.) 21	305
—— *v.* Metropolitan District Railway Company	24 L. T. 435	461
Toms *v.* Luckett	5 C. B. 23	249
Tottenham Local Board *v.* Rowell	1 Ex. D. 514	665
Trapp *v.* Spearman	3 Esp. 57	557, 558
Trew *v.* Burton	1 Cr. & M. 533	558
Trotter *v.* Maclean	13 Ch. D. 574	62
Tuck *v.* Tyson	6 Bing. 321	299
Tucker *v.* Morris	1 Cr. & M. 73	342
Turner *v.* Bridgett; Wright, Claimant	W. N. 11 March, 1882, p. 34	433
——— *v.* Richardson	7 East, 335	481, 485, 486, 491
Twycross *v.* Grant	4 C. P. D. 40	111, 112

V.

Vallejo *v.* Wheeler	1 Cowp. 143	465, 471
Vaughan *v.* Taff Vale Railway Company	5 H. & N. 679	742
Vernon *v.* Cooke	49 L. J. (C. L.) 767	138

W.

Waddilove *v.* Barnett	4 Dowl. 347	369
Wall *v.* Harris	Not reported	729
Walker *v.* Budden	5 Q. B. D. 267	633
Wallis *v.* London and South Western Railway Company	Law Rep. 5 Ex. 62	750, 751, 756
Walton, Ex parte	17 Ch. D. 746	281, 282, 284, 292, 296, 297
Ward *v.* Lloyd	7 Scott N. R. 499	86, 87
Waterlow *v.* Sharp	Law Rep. 8 Eq. 501	400, 403
Watson *v.* Spratley	24 L. J. (Ex.) 53	316, 317
Watts *v.* Shuttleworth	5 H. & N. 235; 29 L. J. (Ex.) 229, 686, 688	
Waugh *v.* Bussell	5 Taunt. 707	558
Wells *v.* Kingston-upon-Hull (Mayor of)	Law Rep. 10 C. P. 402	316, 317, 318
Welsh *v.* Welsh	4 M. & S. 333	299
Whatton, Ex parte	5 B. & Ald. 824	6
White *v.* Bromige	26 W. R. 312	90
——— *v.* France	2 C. P. D. 308	305
——— *v.* Hindley Local Board	Law Rep. 10 Q. B. 219	452, 453
Wickham *v.* Hawker	7 M. & W. 63	318
Wilcocks *v.* Union Insurance Company	2 Binney, 574	465, 466, 469
Williams *v.* Bailey	Law Rep. 1 H. L. 200	87
——— *v.* Lord Bagot	4 D. & R. 315	498, 505
——— *v.* Protheroe	5 Bing. 309	131
——— *v.* Wilcox	8 Ad. & E. 333	166
Willock *v.* Noble	44 L. J. (Ch.) 345	580
Willson *v.* Bates	3 My. & C. R. 197	90
Wilson *v.* Hart	7 Taunt. 295	544
——— *v.* Mayor of Bolton	Law Rep. 7 Q. B. 105	603

		PAGE
Wilson *v.* Merry	1 H. L. Sc., 326	360, 362, 366
——— *v.* Tumman	6 M. & G. 236	341, 349
——— *v.* Wallani	5 Ex. D. 155	476, 477, 489
Winterbottom *v.* Wright	10 M. & W. 109	304, 305, 307
Withernsea Brickworks, In re	15 Ch. D. 337	653, 654, 656
Withers *v.* Reynold	2 B. & Ad. 882	655, 658
Witt *v.* Parker	46 L. J. (Q.B.) 450	57
Wood *v.* Lake	Say. 3	316, 398
——— *v.* Manley	11 Ad. & E. 34	316
Woods *v.* Reed	2 M. & W. 777	499
Woodward *v.* Gyles	2 Vern. 119	405
Woollen *v.* Wright	1 H. & C. 554	341
Worcester, Corporation of *v.* Droitwich Assessment Committee	2 Ex. D. 49	25
Worthington *v.* Hulton	Law Rep. 1 Q. B. 63	499
Wright *v.* Pearson	Amb. 358	644
——— *v.* Stavert	2 E. & E. 721	316, 317, 318
Wulff *v.* Jay	Law Rep. 7 Q. B. 757, 765	687

Y.

Yeatman *v.* Yeatman	Law Rep. 1 P. & D. 489	527
Young *v.* Turing	2 Man. & Gr. 593	201

Z.

Zambaco *v.* Cassavetti	Law Rep. 11 Eq. 439	325

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLV VICTORIA.

[IN THE COURT OF APPEAL.]

1882
March 2.

THE LAW SOCIETY OF THE UNITED KINGDOM *v.* SHAW AND BLAKE.

THE LAW SOCIETY OF THE UNITED KINGDOM *v.* WATERLOW BROTHERS AND LAYTON.

Solicitor—Proctor—Unqualified Person acting as a Proctor—6 & 7 *Vict. c.* 73, *s.* 2—23 & 24 *Vict. c.* 127, *s.* 26—*Legal Practitioners Act*, 1877 (40 & 41 *Vict. c.* 62), *ss.* 2, 3—*Rules of Probate Division.*

The defendants, who were law stationers and were not qualified as solicitors or proctors, had been accustomed, upon the instruction of solicitors, to take to the registry of the Probate Division original wills, and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the defendants had been accustomed to communicate the question to the solicitors instructing them.

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

The wills, engrossments, and affidavits were left in the solicitors' names. The defendants only charged for their clerk's time:—

Held, that the defendants had not acted as solicitors or proctors, and were not liable to the penalties imposed by 23 & 24 Vict. c. 127, s. 26.

Affirmed 6 th P.D. & A.P.C. Cas. 607 H.L.

ACTIONS for penalties under 23 & 24 Vict. c. 127, s. 26. (1)

THE LAW SOCIETY OF THE UNITED KINGDOM *v.* SHAW AND BLAKE.

The claim alleged that the plaintiffs were the Incorporated Law Society within the meaning of 23 & 24 Vict. c. 127, s. 26, and the

(1) By 6 & 7 Vict. c. 73, s. 2, "from and after the passing of this Act no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding in the name of any other person or in his own name, in Her Majesty's High Court of Chancery, or Courts of Queen's Bench, Common Pleas, or Exchequer, or Court of the Duchy of Lancaster, or Court of the duchy chamber of Lancaster at Westminster, or in any of the Courts of the counties Palatine of Lancaster and Durham, or in the Court of Bankruptcy, or in the Court for the relief of insolvent debtors, or in any county court, or in any court of civil or criminal jurisdiction, or in any other court of law or equity in that part of the United Kingdom of Great Britain and Ireland called England and Wales, or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard, tried, or determined before any justice of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, liberty, city, borough, or place, or before any justice or justices, or before any commissioners of Her Majesty's revenue, unless such person shall have been previously to the passing of this Act admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this Act be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor pursuant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid."

By 23 & 24 Vict. c. 127, s. 26, "Every person who acts as an attorney or solicitor contrary to the enactment in section two of" 6 & 7 Vict. c. 127, "or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the court of probate or the court for divorce and matrimonial causes, without being duly qualified so to act, shall be deemed guilty of a contempt of the Court in which the action, suit, cause, matter, or proceeding in relation to which he so acts is brought, had, or taken, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done or any disbursement made by him in the course of so acting, and shall, in addition to any other penalty or forfeiture and to any disability to which he may be subject, forfeit and pay for every such

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

defendants were law stationers; that the defendants had acted as proctors in and with respect to the proceedings in the Probate, Admiralty, and Divorce Division in the matter of certain persons deceased, and had so acted in the names of certain solicitors practising in or near London. The claim alleged in the alternative that the defendants in their own name had acted as proctors in and with respect to the aforesaid proceedings in the aforesaid Court; that the defendants were not qualified so to act within the meaning of 23 & 24 Vict. c. 127, s. 26: that the defendants had acted as attorneys and solicitors in the matters and proceedings aforesaid without being admitted or inrolled or otherwise duly qualified to act as attorneys or solicitors, within the meaning of 6 & 7 Vict. c. 73, s. 2, and 23 & 24 Vict. c. 127, s. 26. The claim further alleged that the action was brought with the sanction of Her Majesty's Attorney General.

The defendants having pleaded not guilty, by statute, 21 Jac. 1, c. 4, s. 4, the plaintiffs joined issue.

The action came on for trial before Grove, J., and a special jury, when by consent the jury were discharged and the action was left to the judge to decide.

At the trial it was admitted by the counsel of the parties that the course of business of the defendants, which had been followed

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offence the sum of fifty pounds, to be recovered, with full costs of suit, by action brought with the sanction of Her Majesty's Attorney General in the name of the Incorporated Law Society, in any of the superior courts of law at Westminster or in any county court, and such penalty shall be applied in like manner as fines imposed for practising without a stamped certificate are now by law applicable."

By the Legal Practitioners Act, 1877 (40 & 41 Vict. c. 62), s. 2, "any surrogate or other person not being a qualified practitioner who for or in expectation of any fee, gain, or reward, either directly or as the agent of any other person whether a qualified practitioner or not, takes instructions for or draws or prepares any papers on which to found or oppose a grant of probate or of letters of administration, shall be guilty of an offence within the meaning of the twelfth section of the Attorneys and Solicitors Act, 1874; but nothing in this section contained shall be construed to affect any remedy against any such person under any other Act or Acts whatsoever."

3. "The term 'qualified practitioner' in this Act means and includes any serjeant-at-law, barrister-at-law, certificated solicitor, proctor, notary public, certificated conveyancer, special pleader, or draughtsman in equity."

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

in the cases mentioned in the claim, was of the following nature:—

Solicitors practising in London left with the defendants original wills for the purpose of being engrossed on parchment, in order to obtain probate, with instructions to the defendants to perform the acts hereinafter mentioned as being performed by them, and also the proper affidavits. In accordance with such instructions the original will and the engrossed copy, together with the proper affidavits, were sent by a clerk or messenger in the employ of the defendants to the principal registry office at Somerset House. The defendants provided the necessary inland revenue stamps to discharge the fees payable at the registry office, the defendants being licensed dealers in stamps. The clerk in the registry office gave to the defendants' clerk or messenger a stamped receipt for the above mentioned documents, which were left in the name of the solicitor and not in those of the defendants, and the receipt so stated. At the end of two days the clerk or messenger called at the registry office, and the probate was handed to him upon production of the receipt, unless the documents previously left by him had been found incorrect or insufficient. If any question should arise as to the correctness or sufficiency of the documents, such question was communicated to the clerk or messenger and by him to the defendants, who informed the solicitor from whom they had received the documents thereof. When a satisfactory reply was given, the same procedure took place as before. Throughout all the proceedings the name of the solicitor from whom the document was received alone appeared. The defendant had pursued this course with the knowledge of the officials at Somerset House for some years. Upon the second visit of the clerk or messenger, he, if the documents were sufficient, handed a stamped form purchased from the Commissioners of Inland Revenue and paid for by the defendants' cheque. The defendants only performed the work above described in cases in which they were employed as law stationers to engross the documents. The defendants made a charge, and in making this charge they only calculated the time occupied by the clerk or messenger in his visits to the Registry and Stamp Office. In all cases the London solicitor was also a customer in the defendants' stationery business.

The messenger or clerk had had no legal training, but was an apprentice to the defendants as law stationers. The solicitor charged the full fees allowed by the Probate Division to his client for obtaining the grant of probate. The Probate Division would not receive the papers unless the name of a solicitor applying for probate appeared thereon. The defendants in all cases received papers with the names so written thereon by the solicitor employing them.

Upon these facts Grove, J., gave judgment for the plaintiffs for one penalty of 50*l.*

THE LAW SOCIETY OF THE UNITED KINGDOM *v.* WATERLOW BROTHERS AND LAYTON.

This was an action of a similar nature also tried before Grove, J.

The facts in this action were substantially the same as in *Law Society of the United Kingdom* v. *Shaw and Blake*, except that the defendants in this action acted for solicitors practising in the country. In this case also Grove, J., gave judgment for the plaintiffs.

The defendants in each action appealed.

Feb. 24, 25, 27. *E. Clarke, Q.C.* (*Bremner*, with him), for the defendants in the *Law Society of the United Kingdom* v. *Shaw and Blake*. The defendants have not themselves acted as solicitors or proctors, nor have they done anything which brings them within the terms of or within the mischief aimed at by 22 Geo. 2, c. 46, s. 11, 6 & 7 Vict. c. 73, s. 2, or 23 & 24 Vict. c. 127, s. 26. They did not prepare any deeds or wills, but only engrossed wills for solicitors in London who employed them as clerks for that purpose, and afterwards they took the documents to the office of the principal registry: they acted only as messengers and charged messengers' fees for messengers' work.

[HOLKER, L.J. Is there any difference in principle between what the defendants did and the issuing of a writ of summons from the offices of the High Court?]

It is very different. The defendants only charged for their clerk's time and got no profit out of the transaction. In *Ex parte*

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Whatton (1) it was held that to act as agent for an attorney was not within 22 Geo. 2, c. 46, s. 11, and in *Re King* (2) and *Ex parte Garbutt* (3) were cases of a similar nature: their principle ought to be applied here.

Sir H. James, A.G. (*Willis, Q.C.*, and *Finlay, Q.C.*, with him), for the defendants in the *Law Society of the United Kingdom* v. *Waterlow Brothers & Layton*. The defendants are not liable to penalties, for they did not transact any matter being a proceeding in the Probate Division. In *Richards* v. *Suffield* (4) it was held that the 26th section of 6 & 7 Vict. c. 73, only disabled an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the courts mentioned in the Act, and not for business done which had no reference to such suits or proceedings. *Richards* v. *Suffield* (4) was followed in *Greene* v. *Reece*. (5) A similar principle is to be applied at the present time. The defendants did not take any part in a contentious proceeding, and therefore they are not within the terms of 23 & 24 Vict. c. 127, s. 26. "Proceedings" in the Probate Division do not begin until there is an opposition to the grant. A great deal of a solicitor's business may be transacted by an unqualified person. The argument for the plaintiffs is that the defendants have acted as proctors, therefore it is important to consider what was the position of proctors under the law as it existed before 23 & 24 Vict. c. 127, s. 26. Proctors are officers of the Ecclesiastical and Admiralty Courts who discharge duties similar to those of solicitors and attorneys in other courts: 2 Phillimore's Ecclesiastical Law, part iv. ch. v. p. 1219. Unqualified persons were forbidden to practice as proctors in England, and were rendered liable to a penalty of 50*l.* by 53 Geo. 3, c. 127, ss. 9, 10, and a similar prohibition and a similar penalty were extended to Ireland by 54 Geo. 3, c. 68, ss. 10, 11. It was held by the House of Lords in *Stephenson* v. *Higginson* (6) that the acts intended to be prohibited by the latter statute were those which were legally incident to the office

(1) 5 B. & Ald. 824.
(2) 1 Ad. & E. 560.
(3) 2 Bing. 74; 9 B. Moo. 157.
(4) 2 Ex. 616.
(5) 8 C. B. 88.
(6) 3 H. L. C. 638.

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

of a proctor; not those which, though usually performed by him, were not of right incident to his office. The defendants would not be liable for practising as proctors under the old Acts, and the later statutes do not extend the liability of unqualified persons. No statute is to be found which forbids acts to be done by the public which are not within the business or practice of a proctor. By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 60, a penalty of 50*l.* is imposed upon any unqualified person who for any gain prepares any instrument (with certain exceptions) "relating to real or personal estate, or any proceedings in law or equity:" and by the Legal Practitioners Act, 1877 (40 & 41 Vict. c. 62), ss. 2, 3, any person not being a qualified practitioner, who for any gain prepares any papers on which to found or oppose the grant of probate or letters of administration, is rendered liable to a penalty: apart from these statutes there is nothing to prevent the defendants from drawing the documents and preparing the affidavits necessary to obtain probate. The defendants have not practised as proctors; they have always deposited the documents at the registry in the names of the solicitors who employ them. These actions having been brought upon 23 & 24 Vict. c. 127, s. 26, the defendants cannot be held liable, unless they have acted as proctors.

The plaintiffs cannot rely upon the rules of the Probate Division which have been made pursuant to 20 & 21 Vict. c. 77, s. 30; the second of the rules for Non-Contentious Business (1st Sept., 1862), directs that applications for probate or letters of administration may be made through a proctor or solicitor, or in person by executors and parties entitled to grants of administration; the defendants have not contravened this rule, for the solicitors who instruct them apply through them to the registry. Moreover, the rules merely throw light upon the procedure of the Court, they cannot render any person liable to a penalty.

Sir H. S. Giffard, Q.C., and *G. A. R. Fitzgerald* (*R. T. Reid*, with them), for the plaintiffs. To obtain probate and letters of administration is to practise in the Probate Division and is also a proceeding in Court: the application for probate or letters of administration, consists of going to the registry, satisfying the officers as to the correctness and sufficiency of the documents,

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

and getting the receipt from the officer; it is analogous to issuing a writ in an ordinary action. This work must be performed by a skilful and competent clerk; a mere office-boy would be insufficient and would, no doubt, be objected to at the registry: *Lindsay* v. *Gladstone.* (1) Therefore the defendants' clerks and messengers do the work of proctors' clerks. It is immaterial that the defendants only apply on behalf of their customers, and merely charge for their clerks' and messengers' time: the names of the solicitors are put on the papers brought to the registry merely because the names of the defendants could not be received.

The rules of the Probate Division, 4, 12, 48, 71, require that the person applying at the registry should be competent to give any information which may be thought requisite; and it is an evasion of these rules that unqualified persons, who have no knowledge of the facts of the case, should be allowed to apply for probate. Moreover, by the conduct of the defendants, Waterlow Brothers & Layton, solicitors, practising in the country, are enabled to practise in London, and thereby to escape the payment of the higher rate of duty upon their certificates imposed by the Stamp Act, 1870 (33 & 34 Vict. c. 97). Solicitors were enabled to practise in testamentary matters by 20 & 21 Vict. c. 77, s. 45, but it was not intended that they should avail themselves of the help of law stationers. The case of *Stephenson* v. *Higginson* (2) turned on a mere question of ecclesiastical practice.

Willis, Q.C., in reply for the defendants in each action. The defendants have not taken part in any proceeding in the Probate Division; they do not practise in contentious business.

[COTTON, L.J. Is not an application to the Chancery Division for maintenance for an infant a proceeding? and yet it may not be of a contentious nature.]

The defendants do not obtain probate, they merely do some acts which are necessary for obtaining probate; they perform only ministerial acts.

Cur. adv. vult.

March 2. The following judgments were delivered:—

BRETT, L.J. In these cases the question was whether the

(1) Law Rep. 9 Eq. 132. (2) 3 H. L. C. 638.

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

BRETT, L.J.

defendants had made themselves liable to a penalty under s. 26 of 23 & 24 Vict. c. 127. The question for us to decide, which was raised upon certain admissions of fact, was whether, if those facts were true, the defendants had acted as proctors in or with respect to any proceedings of the Probate Division.

The admitted facts, that is, the facts which are important in order to govern our decision, seem to me to be substantially these: that the defendants are law stationers, and are persons who are entitled to sell the stamps which are put upon legal documents; that they are persons who as law stationers are in the habit, as part of their business, of engrossing certain documents and of copying certain other documents, and they have many clients who are solicitors, and who employ them in their business as law stationers to engross documents and to copy documents; that a certain number of those clients, some in London and some in the country, when they employ them to engross a will, send with the original will either at the same time or afterwards, the documents which, in their judgment, are necessary to obtain probate of the will; and when the defendants have engrossed the will or have made any other copies which are thought necessary, they then, upon the instructions of the solicitors, take the original will and the engrossed will and the documents which they have prepared in their offices, or which have been sent to them, to the registry of the Probate Division, in Somerset House, and there they leave the documents, taking a receipt for them in the names of the solicitors who have sent them. They are left, according to the ordinary course of business, with the clerks in the probate office, in order that they may lay them before the registrar. When the registrar has examined the will and the documents, he exercises the discretion vested in him by virtue of his employment and by the Court, and if the documents which accompany the will and the will itself are in such regular form as to entitle probate to be given out, the defendants get the probate and send it to their client. If the documents are not in order, the registrar makes certain requisitions, which are handed to the defendants' clerks. They do nothing with regard to setting the matter right, but they send those requisitions back to the solicitor who has employed them. Those requisitions are complied with by the solicitor; if

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Brett, L.J.

any further answers are to be made, the solicitor makes those answers, and if any further affidavit is wanted, the solicitor prepares it, and, when ready, the new documents are sent back to the defendants, and they take them to the registrar, and then if all is in order they receive the probate. For what the defendants do at the probate office they are not paid a solicitor's or a proctor's fee, or any fee which is like the fee that would be charged by a proctor or solicitor; but they really charge the solicitors employing them only for the time during which their clerk is engaged in going to the probate office and back, and for the time he is kept waiting at the probate office.

The question, therefore, is whether, under those circumstances, the defendants are liable for the penalty which is enacted in s. 26 of 23 & 24 Vict. c. 127. It was argued that even though this was a proceeding in the Court, nevertheless the defendants would not be liable. It was argued that even though they did everything, drew the affidavits, and did all which was necessary in order to obtain the probate, and even although they undertook to obtain probate as proctors, they would not be liable, because, as was said, the 26th section is only to be applied to acts which are done in the course of contentious business in Court. It was contended that there had been a decision upon a former Act of Parliament, in which with regard to that former Act of Parliament it seems to have been so held; but between that former Act and the present Act of Parliament the Probate Court was instituted, and certain proceedings in the Probate Court, among others the obtaining probate of a will, are declared by the rules which have the force of statutes to be work which can only be done either by a proctor or solicitor or by an applicant in person. The ground of the decision upon the former statute seems to me to have been, that what was alleged to have brought the party within the penalty might have been done by a person who was not a proctor, as well as by a proctor; but then if that was the ground of the judgment, it is entirely altered by the statute constituting the Probate Court, and by the rules that are made under it. The reasoning of that judgment does not apply here. It seems to me that what the defendants did was the last act in obtaining probate, and it seems to me that though the act of

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Brett, L.J.

obtaining probate is done only in the office of the Probate Court, yet, inasmuch as it is done before the registrar, who has to exercise a discretion whether he will allow it or not, to obtain probate is a proceeding in the Probate Division, and that what the defendants did was the last act in a proceeding in the Probate Division, and, therefore, what they did was a proceeding in Court. Nevertheless, still arises the question whether they are within the clause. Now the words of the 26th clause of 23 & 24 Vict. c. 127, are: "Every person who acts as an attorney or solicitor contrary to the enactment in s. 2 of the former Act, or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceedings in the Court of Probate," without being duly qualified, shall be subject to a penalty. In my opinion, what was struck at by that enactment, and what is the proper and true construction of that enactment, is this, that a person must not act as a proctor in or with respect to any proceedings in the Court of Probate for himself, either in his own name or in the name of anybody else, if he is not duly qualified; but that it does not apply to the case of a person who is not acting for himself at all, but who is acting as a mere agent for a solicitor whose name he gives, and with whose authority and consent he acts; therefore it seems to me that the defendants in this case were not acting as proctors on their own behalf, but they were acting for solicitors as mere agents of those solicitors, in the name of those solicitors, with the authority and consent of those solicitors, and they were therefore not acting as proctors at all on their own behalf. If they had, without being qualified, and without giving their name, been really acting as partners with a solicitor, and taking part of the advantages of a solicitor's business, I should have thought they were acting as proctors for themselves; but under the circumstances of this case, it seems to me that they were not. They certainly were paid for what they did, but they were not paid by way of the fee of a proctor. They were paid, really and truly, nothing more than what has been called in this case "messengers' fees." In my opinion this statute does not reach the defendants.

It is quite sufficient for the purpose of this case to stop here, and say that, under 23 & 24 Vict. c. 127, s. 26, the defendants are

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Brett, L.J.

not liable; and the subsequent statute, 40 & 41 Vict. c. 62, was referred to only for the purpose of enabling us, I think, to construe the earlier enactment. Nevertheless, I wish to say this, inasmuch as this seems to be a matter of considerable controversy in the legal profession, I do not think the defendants would be liable for what they have hitherto done even under 40 & 41 Vict. c. 62; but if they go further and undertake to prepare affidavits, or to prepare documents which can be used for the purpose of obtaining probate, then they may come within 40 & 41 Vict. c. 62; but so long as they confine themselves to doing what they have done in this case, it seems to me they are not liable under any of the statutes.

COTTON, L.J. In these two cases the question which we have to consider is, whether the defendants are liable to the penalties imposed by s. 26 of 23 & 24 Vict. c. 127, and the question turns simply on that section and the facts of the case. I do not think it necessary to go into the consideration of the provisions of the older statutes, which have during the argument been brought before us, for the purpose of ascertaining what is the true effect and construction of the enactment upon which the plaintiffs rely: they are not directly in point.

The 26th section imposes a penalty upon any person who in his own name, or the name of another, acts as a proctor in any proceedings in the Court of Probate. The first question to be considered is, whether what is done by the defendants is a proceeding in the Probate Division, and in my opinion it undoubtedly is, because the application is made on behalf of the executor to the registrar of the Probate Division for the purpose of getting probate; that is to say, for the purpose of getting an order from that Court granting probate of the will; and one of the papers which are handed in for the purpose of getting the order from the Probate Division states that the executors are desirous of obtaining probate, and that paper is headed, "In the High Court of Justice—Probate, Divorce, and Admiralty Division." Therefore, in my opinion, this is an application to the Probate Division for the purpose of obtaining probate of the will, or grant of letters of administration, and must be considered a proceeding in that Court,

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Cotton, L.J.

being a proceeding in the Court for the purpose of getting such a grant.

Of course that will not decide the question. What we have to consider is this, whether the defendants in the two suits (I will state presently why I think there is no difference between them) have acted as proctors within the meaning of the statute. In my opinion, if any one did what the defendants have done on his own behalf and for his own purposes, he would be acting as proctor in a proceeding in the Probate Division, for he would be making the application for the grant. I quite agree that to act as a proctor must be to do something which is exclusively within the province of a proctor to do, and not to do something which any one may do, though proctors ordinarily do it: but in this case we have the rules and regulations of the Probate Division; and one of those orders, rules, and regulations says that the application for probate shall be made either by the applicant in person or through a solicitor or proctor. As I understand the rule, a person may apply on his own behalf, but if he does not, he must act by and through a proctor, just as a defendant who does not conduct his own defence, or as a plaintiff who does not prosecute his own claim, acts by a solicitor. In my opinion, having regard to that rule, any one who does on his own behalf make such an application as this — I do not mean an executor in person, but any one acting for an executor and on his own behalf—is acting as a proctor in a matter or proceeding in the Probate Division. It was said that the rules of the Court could not make a man liable to the penalty. Undoubtedly not; but the rules of Court can prescribe what work shall be done exclusively by a proctor or solicitor, and make that which, but for the rules, would be open to the public exclusively the work of a proctor or solicitor.

It was urged that the statute was confined really to contentious business, and that there was an authority in favour of that in the House of Lords. Of course, if there had been an authority applicable to the present state of things, we should have been bound by it; but that authority was before and independent of the rules of the Probate Division, and it being shewn as a fact, that what had been done by the subject who was sued for

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Cotton, L.J.

penalties, was ordinarily done by persons who were not proctors, and that no rules of Court made that wrong, or made what he had done exclusively within the business or profits of a proctor, he could not be considered as acting as a proctor in the matter. I cannot accede to the view that only contentious business was aimed at. It was said that proceedings in Court do not begin until there is some opposition to the granting of the probate; but that really, in my opinion, cannot prevail. A large number of proceedings, especially in the Probate Division, as in the Chancery Division, are not contentious in their nature or between adverse litigants. Those are, nevertheless, in my opinion, proceedings in the Court in which they are taken, and it is impossible to confine "proceedings" to contentious proceedings, having regard to the rules of the Probate Division. It is impossible to say that a man who is acting in non-contentious proceedings is not acting as a proctor when the rules say that a proctor only or solicitor shall make such applications. I thought it right to go into this, for it was argued at length, and it may guide persons in their future conduct; but still there comes the question, whether these defendants have been so acting as to make themselves liable to penalties. In my opinion it would be a wrong construction to hold that they have. In my opinion the statute does not apply to a person who, having authority to act, is bonâ fide acting, not on his own behalf, but simply on behalf of another, a duly qualified practitioner in whose name the application is made. At one time I thought it might be important to consider whether Messrs. Waterlow Brothers & Layton, or their messenger or servant, could in such a proceeding as this properly be said to represent the solicitor as a clerk would do, but on consideration I think that is a question for the Probate Division. The defendants clearly are representing the solicitor, they are not acting on their own behalf, but simply acting for the solicitor in the same way as a clerk of the solicitor, or a person employed pro hac vice as a clerk, may be. In my opinion, whether a solicitor ought to be so represented—whether he ought to be represented by a person in the employment of the defendants, Waterlow Brothers & Layton, or his own clerk in the matter—is a question which the Probate Division must consider, and we ought not to consider that in

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

COTTON, L.J.

determining whether persons who, having authority to act, are bonâ fide acting, not on their own behalf, but for the solicitor, are liable for the penalty under the Act. That in my opinion disposes of the case before us.

One word as to the two cases. The only difference urged between the two cases was this, that in one the defendants acted for London solicitors, but in the other the defendants acted for solicitors not taking out London certificates, but simply certificates authorizing them to practise in the country. I express no opinion whether solicitors in the country not having London certificates have in any way made themselves liable by what they have done—we cannot properly consider that here—all we have to consider is this, whether the defendants, acting bonâ fide as they have done, have rendered themselves liable to the penalty under the Act. In my opinion they have not. I would say one word of caution, lest my judgment should be supposed to proceed further than I intend it to do, and that is, that if the defendants, or persons in their position, though nominally acting as messengers for and on behalf of solicitors, were really acting for themselves, that is to say, were getting a share of the profit made by the solicitors or getting the profit which the solicitors make, they would not, in my opinion, escape the penalty imposed by this Act, and probably they might come within the enactments of other statutes, and be made liable to penalties under the other statutes. That is not, however, the question that arises here; I only mention it by way of caution, so that it may not be supposed that our judgment will be an authority in favour of persons acting in any way otherwise than in such a way as the defendants have been acting in this matter, who are simply getting payment for sending a messenger down to the office, and are not in any way acting so as to get in the name of the solicitor the solicitor's profit or the proctor's profit.

HOLKER, L.J. It seems to me that these two cases are practically the same. The facts in the two cases do not differ, except in this one particular, that in the second the defendants act for country solicitors who employ them, and in the first they act for London solicitors. That fact can really make no difference. It

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Holker, L.J.

seems that both cases depend upon the same principle, and must be decided upon the same principle. Brett, L.J., and Cotton, L.J., have gone so fully into the question that I do not think it necessary for me to add many words to what they have said. It is not necessary to go further than the statute upon which this proceeding is taken. That statute practically says that a man who acts as a proctor in his own name, or in the name of another, without being duly qualified so to act, shall incur a certain penalty. I find that under the Probate Act, which was passed in 1857, and under the rules made for the carrying out of that Act, applications for grant of administration and applications for probate and letters of administration are to be made either through a proctor or a solicitor, or by the executors and the intending administrators themselves. Therefore under those rules, made for the purpose of carrying out the Probate Act, such applications can only be made through a proctor or through a solicitor or by the parties themselves. It may be that one of the objects of the statute, 23 & 24 Vict. c. 127, s. 26, was to enforce that provision. Then comes the great question, have the defendants acted as proctors in their own names or the name of any one else? It seems to me they have not. The facts are very clearly stated in the admissions, and they come to this: that when a country solicitor, or any solicitor, sends Messrs. Waterlow an original will to be engrossed (it is quite clear a law stationer has a right to engross the document), after it is engrossed the solicitor writes a letter to the law stationer, and says to the law stationer, "Take these documents which I send you to the registrar or proper officer of the Probate Division, and lodge them with the clerk there, and then, when everything is in order" (they have to provide the stamp), "go back again and get the papers from the office," and that is all that is done. It seems to be admitted on all hands that if the country solicitor or the London solicitor were to employ an office boy, whose wages might be 5*s.* a week, for the purpose of doing this business, they would be acting rightly and within the scope of their business. Can it make any difference that instead of employing an office boy they employ a competent clerk who is in the service of the defendants or they employ the defendants, who in their turn employ a competent clerk who is

1882

LAW SOCIETY v. SHAW.

THE SAME v. WATERLOW.

Holker, L.J.

in their service? It seems to me that all that the defendants do is done under the authority, and by the instructions and directions, of the solicitors and in the name of the solicitors, and what they in fact do is to act as messengers and to do nothing more. As they act as messengers and do nothing more, I think they do not come within the scope of this enactment, and are therefore not liable to the penalty.

BRETT, L.J. We do not consider we are differing at all from any opinion formed by Grove, J., for we understand his judgment was merely a formal one, and did not express his view of the construction of the Act of Parliament.

Judgment reversed.

Solicitors for plaintiffs: *C. O. Humphreys & Son.*

Solicitors for defendants, Shaw & Blake: *Ashurst, Morris & Co.*

Solicitors for defendants, Waterlow Brothers & Layton: *Layton, Son, & Lendon.*

J. E. H.

COOMBER, APPELLANT; THE JUSTICES OF BERKS, RESPONDENTS.

March 24.

Revenue—Income Tax—Justices—Assize Courts—Police Stations—5 & 6 Vict. c. 35—16 & 17 Vict. c. 34—Schedules A & B.

The justices of a county, in the due exercise of statutory powers, erected assize courts with the usual rooms and offices, and a county police station with the usual offices and accommodation for constables living there, and for prisoners. The courts and police stations were contained in one building, and were used for the administration of justice, and for police purposes. Parts of the building were also used for holding county and committee meetings and various other occasional purposes, but no rent or profit was received or made in respect of the building or any part of it:—

Held, that income tax was not payable in respect of the building under schedules A or B of the Income Tax Acts.

Affirmed on appeal 10 QBD 267 C.A.

CASE stated for the opinion of the Queen's Bench Division, under Part III. of 37 & 38 Vict. c. 16.

The justices of the county of Berks having been assessed, under schedule A of the Income Tax Acts, in respect of certain

1882

COOMBER v. JUSTICES OF BERKS.

buildings in the parish of St. Lawrence, Reading, described in the assessment as "assize courts, &c.," of the alleged annual value of 300*l.*, appealed, by the clerk of the peace of the county, against the assessment to the commissioners appointed under the Income Tax Acts, who discharged the assessment subject to a case.

The material facts stated in the case were as follows:

1. There was no separation in the assessment, and no description of the different buildings included therein under the name "assize courts, &c."

2. The assize courts and the county police station form one block of buildings within the same walls, and covered by the same roof. They were erected at the same time though under different statutory powers.

3. The erection of the assize courts was duly considered and resolved upon by the county justices in 1858, and the present site, adjoining land the purchase of which had been already authorised for the erection of constabulary buildings, was then approved. The erection of the buildings was pursuant to public general statutes and not to any private Act.

4. The cost of building the courts was provided for by money borrowed upon the mortgage of the county rates under 7 Geo. 4, c. 63, s. 11, and the maintenance of the building is provided for out of the county rates. The erection took place, and the maintenance and control of the whole block are regulated (if at all) by public general statutes only.

5. The ground floor of the block consists of the following premises, namely, two assize courts opening out of a large hall and corridor, with retiring rooms for judges and juries, counsels' robing and consultation rooms, an office for the use of the county treasurer during the sittings of the assizes and quarter sessions, offices for the clerks of indictments at assizes, and for other officers attending upon the judges, and also a room for the use of the clerk of the peace, as hereinafter mentioned. There are also on the ground floor offices for the chief constable of the county and the chief superintendent of police and one divisional officer of police.

The first floor consists of rooms for the grand jury, for witnesses in waiting, for committees, and for the living and accommodation

of the superintendent of police. Over the jury and counsel's robing rooms before-mentioned there is a police dormitory with sleeping accommodation for six or seven men.

In the basement, and below what has been described as the ground floor, there are cells for the reception of prisoners detained in custody by the police, or kept, owing to the distance from the gaol, immediately before and after trial at the courts. There are a refreshment room for the use of the public at the assizes and sessions, and washing-houses and store rooms in connection with the refreshment room, &c. A police guard room is situated below the jury rooms and counsel's robing and consultation rooms. This is used by the resident constables for purposes of duty and for cooking the food of prisoners during their detention. A married constable as part of his duty is required to reside in some of the rooms below the offices of the assize courts, having his sleeping accommodation on the second floor over the committee or grand jury rooms, with access by means of the staircase leading to those rooms.

Some of the rooms originally designed for the offices of the clerk of the peace during the quarter sessions are occupied by another married constable who performs the duties of hall-keeper. The clerk of the peace has no use whatever or at any time of any rooms for his private purposes or business. The one room reserved for him is used by him only as a depository for the statutes and books required in connection with the courts, and for deposited railway plans, and other county records in his possession as deputy custos rotulorum of the county. He has no vested interest in his room, and the use he makes of it is official only, and was not considered as of any benefit or value to him in adjusting his salary. He does not, in fact, use the room except at quarter sessions and when attending committee meetings of justices.

There are a subterranean passage and several doorways and openings affording complete communication between various parts of the block, so that although the uses to which the parts are applied are distinct the structure is one and entire.

Unmarried constables inhabit the dormitory before mentioned, subject to written regulations for discipline. The constables of the division are bound to live upon the premises, but are liable

1882

COOMBER v. JUSTICES OF BERKS.

to be removed for duty to any other place, and they are at all hours liable to be called out on service.

6. The courts are used for holding the assizes and for holding the county quarter sessions and the county divisional petty sessions, and also for the purposes of the county court. The commissioners of public works pay 1*l.* per month for the lighting, warming, and cleaning of the courts when used for county court purposes as provided by the statutes.

Rooms in the building are used for meetings of committees of justices appointed by the court of quarter sessions, and the police committee of justices meet in the chief constable's office.

7. The recorder of Reading is allowed to hold the borough quarter sessions in one of the courts. The income tax commissioners have occasionally sat in one of the committee rooms.

The entrance hall is used as a polling station for the county elections, and the grand jury room for casting up votes by the returning officer.

In 1864 the officers of the Berks militia were allowed, upon special application to the court of quarter sessions, to use the grand jury room as a mess-room and the basement story as a kitchen during their month's training.

An amateur musical society has occasionally practised in the grand jury room.

The committee of management of the Berks' Friendly Society has occasionally met in one of the committee rooms.

Twice since the erection of the courts general county meetings called by the high sheriff have been held in the entrance hall.

The under sheriff has occasionally held writs of inquiry in one of the courts.

On no occasion has any payment or remuneration been received for the use of the building, or any part of it, and no profit whatever has been made out of it.

8. Since 1861 the entire charge of the whole block of buildings has been vested in the chief constable by a resolution of the court of quarter sessions. The chief constable provides a hall-keeper to attend to the ventilating, lighting, and warming apparatus, &c., and the county allows one guinea a week to the credit of the police fund to be applied to those purposes at

the discretion of the chief constable. The uses of the building mentioned in par. 7 have been by the allowance of the chief constable. On the two occasions when the hall was used for county meetings the chairman of the quarter sessions gave permission on his own responsibility. Except in the case of the militia the justices in quarter sessions have never authorized or sanctioned, nor been asked to authorize or sanction, the use of the buildings in the manner specified in par. 7.

9. The county police station was erected under 3 & 4 Vict. c. 88, s. 12, on lands purchased by the justices. The cost of the land, and of erecting the police station, was provided by money borrowed on mortgage of the police rate. The land on which the assize courts and also the central police station are built was conveyed, under 21 & 22 Vict. c. 92, in 1859 by the direction of quarter sessions (two justices having at a previous sessions been authorized to enter into a contract for its purchase) unto G. B. Morland (the then clerk of the peace) to have and to hold the same premises unto and to the use of the said G. B. Morland and his successors for ever, upon trust to permit a police station-house to be constructed on the premises at the expense of the justices, and otherwise to permit the premises to be used, appropriated, and disposed of, as the justices of the peace of the county should from time to time order.

11. The police station is used as the central police station for the county for the temporary confinement of persons taken into custody by the constables.

It is necessary that two superintendents and a certain number of constables should be always on the spot available for duty; and sleeping and living accommodation is provided for them as hereinbefore mentioned. Their residence on the premises is part of their duty.

No rent is paid by them for the accommodation given. Some unmarried constables who are compelled as part of their duty to sleep at the station, are required to contribute 1*s.* each per week to cover the expense of gas and fuel for their cooking in the guard room, and for washing.

The superintendent and married constables pay for their gas and coals themselves.

1882

COOMBER v. JUSTICES OF BERKS.

No more or better accommodation is provided than is absolutely required for the proper maintenance of the constabulary, and no profit or pecuniary benefit is derived from the use of the building.

14. So far as it was a matter of fact for their determination, the commissioners found that neither the justices of the peace, nor the clerk of the peace, nor the members of the constabulary, derived any benefit whatever from, nor had they any beneficial nor indeed any occupation of the premises by reason of their use thereof, and that their use thereof was solely official, and for purposes of duty, and that (except the clerk of peace as herein appears) they were not the owners, nor were any of them occupiers, thereof; that the buildings were not adapted for any purposes but those for which they were used, and no rent ever had been received for them or any part of them.

No evidence was given before or tendered to the commissioners as to the alleged annual value of the assessed premises or any part thereof.

The questions for the opinion of the Court were:—

I. Whether the buildings were, or any and what part thereof was, properly assessable to income tax.

II. If the buildings were (or some part thereof was) properly assessable to income tax, were the justices of the county for the time being chargeable with income tax in respect of the said buildings under Schedule A.

III. If the buildings were (or any part thereof was) properly assessable to income tax, and the justices were not chargeable with income tax in respect thereof, whether the clerk of the peace, or the inhabitants, or ratepayers of the county, or any other person or body of persons, was or were chargeable with such income tax.

IV. If part only of the premises were chargeable, what part was chargeable, and who was to be charged and in what capacity, and under what schedule, and how was the amount to be ascertained.

V. Whether the assessment could in law be maintained, or whether the commissioners' decision was under the circumstances lawful.

Sir H. James, A.G. (*Sir F. Herschell, S.G.*, and *A. Dicey*, with him), for the appellant. By 42 & 43 Vict. c. 21, income tax for the year 1879 is charged upon the property, profits, and gains taxable by 16 & 17 Vict. c. 34. By s. 5 of the last-named Act the duties thereby granted are to be raised and assessed under 5 & 6 Vict. c. 35. The property, profits, and gains specified in the schedules of 16 & 17 Vict. c. 34, are therefore the subject-matter of the tax, and 5 & 6 Vict. c. 35, must be looked at in order to ascertain the mode of assessment.

Schedule A. of 16 & 17 Vict. c. 34, is "for and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every 20*s.* of the annual value thereof."

Schedule B. is "for and in respect of the occupation of all such lands, tenements, hereditaments, and heritages as aforesaid, and to be charged for every 20*s.* of the annual value thereof."

Turning to 5 & 6 Vict. c. 35, it is to be observed that No. I. of the Rules following s. 60 (being the general rule for estimating the lands, &c., mentioned in schedule A), is to be construed as extending to "all lands, tenements, hereditaments, and heritages capable of actual occupation."

By s. 70 the lands are to be assessed, whether there is an occupier or not. No. IV. rule 9, of the same rules following s. 60, enacts that the occupier shall be entitled to deduct property tax from his next rent, contemplating therefore the existence of a tenant paying rent. By rule 2 of No. IX., every person having the use of land is to be taken to be the occupier for the purposes of the Act; and if the property belonged to the Crown the occupier would be assessed under No. IV., rule 8. Primâ facie, therefore, the liability is imposed upon all land, whether occupied or not. For convenience, the tax is collected from the occupier, and if there is no occupier, the person having the use of the property is liable. It is a tax on property, not on occupation, and the ownership need not be a beneficial ownership.

The words "use of lands," do not mean physical use: *Bent* v. *Roberts.* (1) In *Clark* v. *Dumfries Commissioners of Supply* (2), the Court held that the police commissioners were the holders of

(1) 3 Ex. D. 66.

(2) 7 Sc. Sess. Cas. 4th Series, 1157.

1882

COOMBER v. JUSTICES OF BERKS.

heritable property within the Act, and the principle of this decision applies to the justices in the present case. By 21 & 22 Vict. c. 92, s. 3, the lands in question are to be held, used, &c., by the clerk of the peace "according to the orders and directions of the justices." Assize courts and police stations would have been included in the list of exemptions, termed "allowances," in No. VI. of the rules, if the legislature had desired to exempt them from the duty.

H. Mathews, Q.C. (*H. D. Greene*, with him), for the respondents. This is an attempt to assess an entirely new body. The income tax is not a charge upon land, but upon the individual. It is a tax on profits upon property and occupation of property in land.

Under schedule A of 16 & 17 Vict. c. 34, the "annual value" of lands, &c., is to be taxed. The Act contemplates some person having gains and profits—either in money or its equivalent—out of the lands, and he is taxed according to the result, actual or potential, in money or its equivalent. This principle runs through all the rules following s. 60 of 5 & 6 Vict. c. 35, which apply to schedules A and B. The exemptions specified in No. VI. all relate to property which, unless specially exempted, would be liable to income tax, because the lands belonging to all the institutions named in the rules are capable of producing a profit, and in many instances do produce one, to the owners. But assize courts are not within the enactment, and therefore need no exemption.

The "use" mentioned in rule 2 of No. IX. is meant to be a beneficial use, analagous to the possession of a tenant. There is no "assessment" of the occupier. By s. 70 of 5 & 6 Vict. c. 35, the duties are to be assessed on all lands, whether occupied or not, with a proviso that duties shall not be levied upon any house which shall be unoccupied during the year or portion of a year in respect of which the assessment is made. *Bent* v. *Roberts* (1) is a direct authority that the occupation which would render a person liable to the tax under schedule A. must be a beneficial, not a mere precarious or official, occupation. If there is any liability to the tax in this case, the justices were not the persons liable. They are neither owners nor occupiers; the clerk of the peace has the legal estate, and the ratepayers of the

(1) 3 Ex. D. 66.

county, for whom he is a trustee, have the beneficial interest. The justices, as justices merely, could not deal in any way with these assize courts; their only power to do so is at quarter sessions. The legislature has treated this class of property as belonging to the inhabitants of the county in a long series of statutes, of which the following may be named: 7 Geo. 4, c. 64, s. 15; 1 Vict. c. 24, s. 3; 10 & 11 Vict. c. 28, s. 1; 13 & 14 Vict. c. 61, s. 24; 18 & 19 Vict. c. 126, s. 15; 19 & 20 Vict. c. 69, s. 22; 33 & 34 Vict. c. 15, s. 3; 40 & 41 Vict. c. 21.

Further, there is no one liable to income tax in this case; the buildings are occupied for public purposes of such a character that the occupation must be taken to be by the Crown, and the Crown not being named in the statute, is not bound: *Mersey Docks and Harbour Board* v. *Cameron*, and *Jones* v. *Mersey Docks and Harbour Board* (1); *Reg.* v. *St. Martin's, Leicester.* (2) There are also a series of decisions in rating cases shewing the nature of an occupation such as this, and that it does not impose any liability to be rated for the relief of the poor: *Reg.* v. *Justices of Worcestershire* (3); *Reg.* v. *Overseers of Manchester* (4); *Justices of Lancashire* v. *Overseers of Stretford.* (5)

In *Justices of Lancashire* v. *Cheetham* (6), the justices were empowered by a local Act to let the building for profit. Here the building could be used only for public purposes, and was not capable of being used for profit. In *Corporation of Worcester* v. *Droitwich Assessment Committee* (7), the Court held that the corporation could only lawfully be assessed for the relief of the poor with reference to the profit actually derived from their waterworks. Under the Income Tax Acts the assessor is bound to take the poor rate as a measure of value. In this case there is no liability to be rated to the poor, and no value. *Clerk* v. *Dumfries Commissioners of Supply* (8) differs from the present case, because the commissioners were an incorporated body capable of purchasing property under the Lands Clauses Acts.

Sir H. James, A.G., in reply.

(1) 11 H. L. C. 443.
(2) Law Rep. 2 Q. B. 493.
(3) 11 Ad. & E. 57.
(4) 3 E. & B. 336.
(5) E. B. & E. 225.
(6) Law Rep. 3 Q. B. 14.
(7) 2 Ex. D. 49.
(8) 7 Sc. Sess. Cas, 4th Series, 1157.

1882

COOMBER v. JUSTICES OF BERKS.

GROVE, J. This case is by no means free from difficulty, but upon a consideration of the statutes, and of the arguments which have been presented to us, I have come to the conclusion that the respondents are entitled to our judgment. That conclusion is arrived at upon a broad view of the object of the Acts. The 16 & 17 Vict. c. 34 is entitled "An Act for Granting to Her Majesty Duties on Profits arising from Property, Professions, Trades, and Offices." If the title of the Act may be looked at, as I think it may, in order to ascertain the object for which the Act was passed, it indicates clearly to my mind that the legislature contemplated a tax, not upon property itself, but upon the annual profit or benefit which a person derives from the property. The schedules confirm this view. Schedules A, B, C, and D of 5 & 6 Vict. c. 35 are replaced, with slight alterations of language, by the schedules in 16 & 17 Vict. c. 34, but the language, both of the original schedules and of those applicable here, tends to shew that the tax contemplated is a contribution to the revenue of the country in respect of annual profit or benefit. Under Schedule A of 16 & 17 Vict. c. 34 the duty is imposed, not upon, but "for and in respect of" the property in all lands, &c., to be charged for every 20*s.* of the annual value thereof; it is upon the annual value or benefit which a person derives from the property as owner. In Schedule B the tax is "for and in respect of the occupation of all lands," &c., as aforesaid; it is upon the benefit derived from the occupation of property—generally speaking by a person who rents it in order to gain a profit. In Schedule C the tax is "for and in respect of all profits arising from interest, annuities, dividends," &c., and in Schedule D "for and in respect of the annual gains and profits derived from the exercise of trades, professions," &c. A consideration of these schedules does not convey to my mind that Schedule A ought to be separated from Schedules B, C, and D, and a different scope and character attributed to it. No doubt the subject-matter of Schedule A, being different, must in some respects be differently treated, but the object which the statute aims at is to make each person pay the tax according to the aid he may receive either from his property or from his labours in a profession, trade, or employment. At first I was impressed with the Attorney General's argument upon

No. IX. of the rules following s. 60 of 5 & 6 Vict. c. 35. They are rules for charging the duties under Schedules A and B coupled, and the Attorney General argued with great force that the justices, or clerk of the peace, or ratepayers, "have the use" of the buildings here within the meaning of rule 2 of No. IX., and therefore must be taken to be the occupiers. But I think it is clear, having regard to the decision in *Bent* v. *Roberts* (1) that the words "having the use" must be given their primary and more restricted meaning, and not the wider meaning contended for. I am of opinion that the "use" must be a user such as would or might give the person some benefit. It is not necessarily a receipt of rent. As an illustration, a person may have a park producing nothing in actual rent, or something of a merely nominal value, which, let out for agricultural purposes, would produce a large income. There, to my mind, he has the use of the park within the rule, for if he gets no pecuniary benefit he gets an equivalent in the pleasure and advantage of having that for which he would have to pay money. This illustration seems to me to point out the reason why, where land is the subject-matter, the Act applies a treatment different to that which is applied in dealing with gains and profits resulting from the exercise of a trade, profession, &c. In the latter case the gains and profits are generally dependent upon the health and powers of an individual, and where those fail the profits cease; in the former the land has always a capability of producing profit, and if the owner chooses not to take a pecuniary profit, but uses the land for other purposes, the tax is still payable. I think that the "use" mentioned in the rule means a use which is either beneficial or capable of being beneficial.

Again, No. X. of the rules supports the conclusion to which I have come. These rules are for estimating the annual value of properties under Schedules A and B. It is to be remarked that in the heading to these rules, as in No. I. which is the general rule for estimating lands, &c., mentioned in Schedule A, the words "annual value" are used, shewing, I think, that the statute does not aim at the abstract value—the price for which the fee simple of the property would sell, or the sum which, on a calculation of

(1) 3 Ex. D. 66.

1882

COOMBER v. JUSTICES OF BERKS.

GROVE, J.

the rent for a certain number of years, would be the purchase-money, but that it aims at the value of the property "de anno in annum." Provisions in the Act for computing the annual value by taking an average of preceding years may be left out of consideration as not affecting the question. By the first rule of No. X. when the landlord under any covenant or agreement has to pay tenant's rates, &c., the amount is to be deducted from the rent. The deduction is made from the annual value on which he is taxed. If the tax was upon the land itself no reason would exist for the rule. So in the converse case by the next rule landlord's rates and taxes paid by the tenant are to be added to the rent, because there the tenant having paid that for which the landlord was primarily liable, the boon to the landlord goes to increase the annual value. By the 3rd rule of No. X. where the amount of rent reserved in money depends upon the price of grain, the estimate for the purpose of charging the duties under Schedule A shall be the amount payable according to the average price of grain at fairs, &c., during the year preceding the year appointed for payment of the duty, but when the whole or a part of the rent is reserved in grain, the estimate shall be made on the average price during the year appointed for payment of the duty. That rule also shews that the duty is payable in relation to the annual benefit, as nearly as it can be ascertained, for the particular year which a person would receive from the land if he chose so to utilise it. The 4th rule of No. X. which provides the manner in which the estimate is to be made where the amount of rent depends on produce, supports the same view. The 1st and 2nd of these rules refer to Schedules A and B; the 3rd and 4th to Schedule A only, and they all confirm my opinion that the tax is imposed upon the annual value which the owner gets or may get from the land in the shape of rent, and upon the annual value which the occupier gets or may get in respect of his beneficial occupation, i.e., the value which he does or might make out of the land annually after paying his rent. The argument of the Attorney General relied strongly upon No. 1 of the rules, immediately following s. 60 which I have already mentioned. It is a "general rule for estimating lands, tenements, hereditaments, or heritages mentioned in Schedule A," and it provides that the

annual value of lands, &c., charged under Schedule A shall be understood to be the rent by the year at which the same are let at rack rent, if the rent shall have been fixed by any agreement commencing within seven years before the making of the assessment, but if the same are not let at a rack rent, then at the rack rent at which the same are worth to be let by the year; "which rule shall be construed to extend to all lands, &c., capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value, &c." The words "capable of actual occupation" receive an application from what I have already said. It may be that the landlord does not take any rent for his premises, but chooses to employ them in some other way; if so, he is not to escape the tax, but must pay upon an assessment of the land made upon the principle that it is then capable of yielding an annual value. No. II. of the rules shews that it is still the annual value upon which the tax is payable, for it says, "The annual value of all the properties hereinafter described, shall be understood to be the full amount for one year, or the average amount for one year of the profits received therefrom within the respective times herein limited." The word "profits," although it is not used in some of the sections, seems to me to indicate that the legislature contemplated something which either was or might be beneficial to the landlord or occupier; and that the amount of the tax he has to pay is to be calculated with respect to his capability of paying it.

The Act clearly contemplates that the land shall be occupied by some one, either a tenant or by the landlord. But I do not think the use of the word "assessment," as applied to the land, makes the rent itself the subject-matter of taxation. The "assessment" is upon the land in order to ascertain how much it is capable of producing annually, and the amount of the assessment is levied upon the occupier who pays the tax in the ratio of his income. The value of the land is assessed, but that does not make the tax a tax upon the land. Perhaps s. 70 of 5 & 6 Vict. c. 35, may conflict with the contention for the respondents that the person having the beneficial occupation is in all cases the person to be charged, but I do not think it affects the ratio decidendi in this case. I was struck with the Attorney-General's

1882

COOMBER v. JUSTICES OF BERKS.

GROVE, J.

argument, which was a very forcible one, that in the present case the premises sought to be charged are not within any of the exemptions or "allowances" in the Act. It was urged that if the legislature had intended that assize courts should be exempted from the tax, they would have been included in the exemptions specified in the statute. Now the exemptions in the statute are in respect of colleges, halls, hospitals, public schools, almshouses, and literary institutions, and rents of lands belonging to hospitals or public schools. I think there is a distinction between those classes of property and assize courts. The buildings exempted by the statute are such as might, and in the ordinary state of things would, yield a rent to the owners, whether individuals or public bodies. The exemptions are granted, as a rule, where there is no occupier paying any rent for the buildings, and with regard to literary institutions where nothing is charged for the instruction given. But in the present case the assize courts and police offices are not, in their present condition, capable of producing a rent or profit. The justices, in my opinion, have no right to let the buildings, which are wholly devoted to public purposes. If there were any rooms—such as assembly rooms, or a public library, which were not used wholly for the administration of justice, or other administrative work done for the benefit of the public, I should be of opinion that income tax was payable in respect of those rooms. But the case virtually finds that there is in fact no beneficial occupation. Taking the whole of the facts stated in the case into consideration, I think that the justices would do wrong to let any part of these buildings or to receive any benefit in respect of the use of them. The case of the *Justices of Lancashire* v. *Overseers of Cheetham* (1), is distinguishable from the present case, upon the ground that there the justices actually made and received a profit under a contract, and they were held rateable for the relief of the poor in respect of that profit. I own that I think that the distinction between the Scotch case of *Clerk* v. *Dumfries Commissioners of Supply* (2) and the present is a very narrow one. The case was distinguished in argument on the ground that the commissioners bought the property under the Lands Clauses Act, and the justices in the present

(1) Law Rep. 3 Q. B. 14. (2) 7 Sc. Sess. Cas. 4th Series, 1157.

case are not incorporated, and cannot acquire property as a body. I do not think this distinction really affects the reasoning of the Court of Session. Though this Court is not bound by the decision, we should hesitate before differing from it, but I am not sure that the point argued before us was present to the minds of the judges in that case. It is true that *The Mersey Docks Cases* (1) were referred to in the judgments in *Clerk* v. *Dumfries Commissioners of Supply* (2), but the Court do not seem to have had their minds directed to the point which makes the dicta contained in the judgments in the Mersey Docks cases so valuable.

It is true also that the Mersey Docks cases were rating cases, and that the ground upon which Blackburn, J., was of opinion that assize courts would not be rateable, does not apply here, because a rate under the Statute of Elizabeth does not attach except to a beneficial occupation, whereas, under the Income Tax Acts, it is not necessarily the actual beneficial occupation which makes an owner or occupier liable; it is either occupation or capability of occupation. But the dicta, both of the Lord Chancellor and of Blackburn, J., who delivered the opinion of the judges, are very useful, as distinguishing the kind of public purposes for which the property was held in the Mersey Docks cases from such purposes of government and administration of justice as assize courts are used for. Those dicta apply equally to this as to a rating case, and it is possible that if the attention of the judges in the case in the Court of Session had been called to them, the decision might have been different.

I am of opinion for these reasons that the appeal fails, and that the respondents are entitled to our judgment.

HUDDLESTON, B. I am of the same opinion, and for the reasons stated by my Brother Grove. I think the justices of Berkshire are not liable to pay income tax for the Assize Courts, either under Schedule A or Schedule B. Undoubtedly the words used in Schedule A are very large. Under s. 60, A., No. 1 of 5 & 6 Vict. c. 35, the annual value of the property comprised in Schedule A is to be assessed, and it is to be assessed

(1) 11 H. L. C. 443. (2) 7 Sc. Sess. Cas. 4th Series. 1157.

MS. 747

1882

COOMBER v. JUSTICES OF BERKS.

Huddleston, B.

whether the land is occupied or unoccupied. I hold that the Act contemplates the assessment of profits, both of the owner and occupier. I use the word "profits" advisedly, because, although no doubt there is a difference between the language used in Schedules A and B and that used in Schedules C, D, and E, I am still of opinion that the only property taxable under the statutes is property which may give, or is intended to give, profit. The fact that no profit is in fact received affords no test, but there must be a capability of making a profit. The property should also be intended to give a profit, and should be used with an object in the nature of making a profit. As an illustration, supposing a person who desired to honour the memory of a great man chose to erect a large monument upon a space of valuable ground, which he dedicated for the benefit of the public, I should say that he had no intention of making any profit or benefit, and though the land was capable of producing a profit if applied for that purpose, yet it would not be within the scope of these Acts. The Assize Courts in the present case were never intended to be used for profit. They were erected for public purposes. It is noticeable that the words "profit" or "gain" occur most frequently in the schedules and sections of the Acts. Though it is true the words do not occur in Schedules A and B, I think it is clear that the profit on the land itself was contemplated under those schedules, because in s. 52 the person to be taxed is to prepare and deliver a statement when required to do so, "containing the annual value of all lands and tenements in his occupation . . . . the amount of the profits or gains arising to such person from all and every the sources chargeable under this Act, according to the respective schedules thereof," &c. The sources chargeable under the Act include property under Schedule A, and the occupation of property under Schedule B. The annual value of the lands for occupation must first be stated, and if there is no land in occupation, then the person must proceed to state his profits under the other schedules. The title, if it may be taken into consideration by the Court, is conclusive as to the object and meaning of the Act. In Maxwell on the Interpretation of Statutes, the author (at p. 34) states that the title of an Act of Parliament is not regarded by the Court as forming part

of the Act. In Sedgwick's Interpretation of Statutory and Constitutional Law, at p. 50, it is said that the title may be resorted to in order to remove ambiguities. In *Chance* v. *Adams* (1) Treby, C.J., said that "the title of the Act was but a new usage, and began about the 11th of Hen. VII." In *Mills* v. *Wilkins* (2), Holt, C.J., thought that the title was no part of the law or enacting part of the statute. But there is considerable authority in favour of reading the title to get at the object of the Act. In *Stradling* v. *Morgan* (3) the title of the Act was relied on in deciding whether the word "receivers" in 7 Edw. 6, c. 1, applied to receivers generally, or was confined to the king's receivers only. So in *The King* v. *Cartwright* (4) Buller, J., in deciding that assaults upon revenue officers, which could be prosecuted in any Court under s. 26 of 9 Geo. 2, c. 35, only extended to assaults upon them quâ government officers, said that the intention of the legislature might be gathered from other parts of the Act, which was made for the sake of the revenue "as its title imported." In *The King* v. *Marks* (5) the Court looked at the title to determine the scope of the Act under consideration.

I think therefore there is ample authority for saying that the title of an Act may be looked at in order to remove any ambiguity in the words of the Act. The question here being whether the Act contemplated a tax on the profits of property, the title, by which the Act is expressed to be an Act for granting duties on profits arising from property, shews in my opinion that it did. In the present case no profit whatever arises from the assize courts, nor was it ever intended that any should arise. I am therefore of opinion that the income tax is not payable in respect of these courts under Schedule A. As to the question of occupation under Schedule B, the case finds that the courts are used for the judges, the recorder, the magistrates at quarter sessions, and generally for purposes of administering public justice. By rule 2, of No. IX. of the rules following s. 60, the occupier is to be deemed to be the person "having the use" of the property sought to be taxed. I do not agree that the magis-

(1) 1 Ld. Raym. 77.
(2) 6 Mod. 62.
(3) Plow. 199.
(4) 4 T. R. 490.
(5) 3 East, 157.

1882

COOMBER v. JUSTICES OF BERKS.

Huddleston, B.

trates have the "use" of these courts except when they happen to be there. Nor do the judges, nor the recorder, nor do the inhabitants have the use of any but a small portion which is used for the government of the town. The Crown administering the law has really the use of this building, and that is the view expressed by Blackburn, J. in *The Mersey Docks Cases.* (1) I think those cases are a distinct authority to shew that an occupation of the description found in the present case is an occupation by the Crown through its servants. That view was also recognised in the judgments of the Lord Chancellor and Lord Cranworth. In *Reg.* v. *St. Martin's Leicester* (2), the judgments of Cockburn, C.J., and Mellor, J., also favour it. I think, therefore, that the buildings in question are not taxable under Schedule B, because the occupation is the occupation of the Crown, and the Crown not being named in the statute is not bound. The decision in *Clerk* v. *Dumfries Commissioners of Supply* (3), is entitled to respect, but the Court of Session seems to have held that the commissioners being the owners of the property sought to be taxed were in actual possession, and therefore liable. If that distinction is not a sufficient one, the question whether the view taken by the Court of Session is correct, or the one taken by this Court, must be solved by another tribunal.

In the result I come to the conclusion that these assize courts and the police station are not assessable to the income tax.

Judgment for the respondents.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Newman, Stretton, Hilliard, & Williams,* for *J. T. Morland, Abingdon.*

(1) 11 H. L. C. 443. (2) Law Rep. 2 Q. B. 493.
(3) 7 Sc. Sess. Cas. 4th Series, 1157.

W. A.

MEARS *v.* CHITTICK. 1882 *March* 27.

Mayor's Court, London—Practice—New Trial—Mayor's Court Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*), *ss.* 10, 22.

Where a rule has been obtained to enter a nonsuit or for a new trial in the Mayor's Court, London, under s. 22 of 20 & 21 Vict. c. clvii., it is not competent to the unsuccessful party afterwards, even with the leave of the judge, to move the Divisional Court under s. 10.

ACTION tried before the Recorder in the Mayor's Court, London, on the 7th of December, 1881, when a verdict was found for the plaintiff for 10*l.*, leave being given to the defendant to move to enter a nonsuit. A rule nisi was obtained on the 9th of December, against which cause was shewn. The Recorder took time to consider; and on the 27th gave judgment, discharging the rule.

On the 2nd of February, 1882, a rule nisi was obtained in this Court for a nonsuit or a new trial.

Lamaison, shewed cause. There is a preliminary objection, that the leave to appeal was exhausted by the motion made in the Mayor's Court on the 9th of December, 1881, and, assuming a right of appeal to the Divisional Court to exist, this application was out of time. The 10th section of the Mayor's Court Procedure Act, 1857 (20 & 21 Vict. c. clvii.), enacts that, "if upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move in any of the superior Courts to set aside a verdict or a nonsuit, and to enter a verdict for the plaintiff or defendant, or to enter a nonsuit, as the case may be, or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in such superior Court, for a rule to shew cause why such verdict or nonsuit should not be set aside and a verdict for the plaintiff or defendant or a nonsuit entered, or why a new trial should not be had, as the case may be, in such action; which Court is hereby authorized and impowered to grant or refuse such rule, and afterwards to proceed to hear and determine the merits thereof, and to make such orders therein and as

1882

MEARS v. CHITTICK.

to costs as the same Court shall think proper," &c. Sect. 22 enacts that "the judge of the Court may at any time within the jurisdiction of the Court hear and grant applications for rules to shew cause in arrest of judgment, or for judgment non obstante veredicto, or for a repleader, or for granting new trials, and for entering nonsuits and verdicts in causes pending in the Court." It was under this section that the leave to move was given by the recorder; and that leave was exhausted by the order of the 27th of January; and no further motion could be made. In *Folkard* v. *Metropolitan Ry. Co.* (1), a cause was tried on Thursday, and the judge immediately after the trial refused leave to move, but on the following Monday changed his mind, and granted it: and it was held (Brett, J., dissenting) that the leave could not be considered as given "upon the trial of the issue," in accordance with the Act.

M'Call, contrà. When the recorder gave judgment discharging the rule, he observed that the matter was a fit one to be brought before the Divisional Court, and that he would give every facility for that purpose, and this opinion has been indorsed by him upon his notes.

GROVE, J. If the leave to move originally given was a leave to move the superior Court under s. 10 of the Mayor's Court Procedure Act, it was exhausted by the defendant's election to treat it as a leave to move under s. 22. The Recorder clearly had no power after that to give a further leave to move. Taking it in any way, therefore, this motion was out of time.

HUDDLESTON, B., concurred.

Rule discharged.

Solicitor for plaintiff: *F. Hulbert.*
Solicitor for defendant: *H. A. Lovett.*

(1) Law Rep. 8 C. P. 471.

J. S.

GODDARD AND SON *v.* O'BRIEN.

1882
March 27.

Accord and Satisfaction—Delivery of Cheque.

A., being indebted to B. in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B. a cheque for 100*l.* payable on demand, which B. accepted in satisfaction :—

Held, a good accord and satisfaction.

Cumber v. *Wane* (Stra. 426) and *Sibree* v. *Tripp* (15 M. & W. 23) observed upon.

11 QBD 923

CASE stated by the Judge of the Southwark County Court.

1. The action is brought to recover amongst other items, 25*l.* 7*s.* 9*d.*, balance of account for goods sold and delivered between the 6th of May, 1879, and the 26th of April, 1880.

2. On the 16th of August, 1880, the defendant was indebted to the plaintiffs in the sum of 125*l.* 7*s.* 9*d.* for billiard table slates sold and delivered by them to him. On that day Mr. Newitt, a member of the plaintiffs' firm, met the defendant and agreed to accept the sum of 100*l.* in discharge of the said sum of 125*l.* 7*s.* 9*d.* The defendant thereupon gave to the plaintiffs a cheque for 100*l.* payable on demand, and the plaintiffs gave him a receipt in the following form,—"Received the sum of 100*l.* by cheque, which is to be in settlement of account of 125*l.* 7*s.* 9*d.*, on said cheque being honored. August 16th, 1880." The cheque was duly honored. There was no consideration given by the defendant or received by the plaintiffs in satisfaction of the said sum of 125*l.* 7*s.* 9*d.*, other than the cheque for 100*l.*

5. The action was tried on the 2nd of December, 1881, and judgment was given for the defendant on the 12th of January, 1882; the judge holding that the payment to and acceptance by the plaintiffs of the cheque for 100*l.* in settlement of their claim for 125*l.* 7*s.* 9*d.* was a good accord and satisfaction, by reason of the cheque being a negotiable security, although the payment of 100*l.* in cash would not have been a good accord and satisfaction.

The questions for the opinion of the Court were,—first, whether the payment by the defendant to the plaintiffs of the cheque for 100*l.* in settlement of their debt of 125*l.* 7*s.* 9*d.* was a good

1882

GODDARD v. O'BRIEN.

accord and satisfaction of the whole of the plaintiffs' debt,—secondly, whether the plaintiffs were entitled to judgment for the 25*l.* 7*s.* 9*d.*

Broun, for the plaintiffs. This case falls within the rule laid down by Pratt, C.J., in *Cumber* v. *Wane* (1), that a debt is not satisfied by the receipt of a security of equal degree for a smaller sum. To make it enure as a satisfaction, there must be a collateral agreement that the lesser amount shall be received in satisfaction of the larger. The cheque here was not a negotiable instrument, nor was it received as such; it was accepted as cash conditionally on its being duly honored, as appears from the form of the receipt. The reason for the distinction between a payment in cash and a payment by a negotiable security is clearly stated by Alderson, B., in *Sibree* v. *Tripp* (2): "It is undoubtedly true that payment of a portion of a liquidated demand in the same manner as the whole liquidated demand ought to be paid is *payment* only in part, because it is not one bargain, but two, viz. payment in part and an agreement, without consideration, to give up the residue. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value." And Parke, B., says (3): "It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be *satisfaction* of the whole. If the contract be by bond or covenant, it can be determined only by something of an equal or higher value: but, upon a mere simple contract, it is clear that the debtor may give anything of inferior value in satisfaction of the sum due, provided it be not part of the sum itself." And further on: "Again, a sum of money payable at a different time is a good satisfaction of a larger sum payable at a future day: Com. Dig. *Accord.* (B. 2.) In the present case (supposing it a liquidated demand), the satisfaction is by giving a different thing, not part of the sum itself, having different properties. It may be of equal value, but that we cannot enter into; it is sufficient that the parties have so agreed. The case of *Andrew* v. *Boughey* (4) is an authority in support of this view."

(1) Str. 426.
(2) 15 M. & W. 23, 37; 15 L. J. (Ex.) 348.
(3) 15 M. & W. at p. 33.
(4) Dyer, 75. a.

1882

GODDARD v. O'BRIEN.

[HUDDLESTON, B. *Sibree* v. *Tripp* (1), if it does not overrule, is entirely inconsistent with *Cumber* v. *Wane*. (2)]

This case is quite beside *Sibree* v. *Tripp*. (1) There, there was a distinct consideration for the accord besides the giving of the new promissory notes and the acceptance of them by the defendant, viz. the putting an end to litigation between the parties. Here, the finding of the judge in par. 4 of the case is, that it was the money and not the cheque that was accepted in satisfaction. It was a conditional payment; and there was no consideration for the abandonment of the excess. The ruling was therefore wrong.

Woodward, for the defendant, was not heard.

GROVE, J. I am of opinion that the decision of the county court judge was right. The difficulty arose from the rule laid down in *Cumber* v. *Wane*. (2) But that doctrine has been much qualified, and I am not sure that it has not been overruled. In *Sibree* v. *Tripp* (1) the judgments of Parke and Alderson, B.B., are strong expressions of a contrary opinion. That case, in which it was held that the acceptance of a negotiable security for a smaller amount may be in law a satisfaction of a debt of a greater amount, is a direct authority that the giving of a negotiable security is not within the rule of *Cumber* v. *Wane*. (2) That was a just and proper decision, and must govern this case. It is said that part of the consideration there was the putting an end to litigation between the parties. Non constat that there was not a stoppage of litigation here. It is further said that the acceptance of the cheque here was conditional only. Possibly that might make the consideration of less value. To say that you may receive something which is not money,—a chattel, for instance, of inferior value,—but that you cannot receive money, is to my mind a very singular state of the law. I cannot see why the same reasoning should not apply to a chattel as to money. It is enough, however, to say that I think the decision of the county court judge was right.

HUDDLESTON, B. I am of the same opinion, and upon the

(1) 15 M. & W. 23. (2) Str. 426.

1882

GODDARD v. O'BRIEN.

ground upon which the county court judge decided this case, viz. that there was a good accord and satisfaction by reason of the cheque being a negotiable security. The doctrine of *Cumber* v. *Wane* (1), if not actually overruled, has been very much qualified. In the notes to that case in the 8th edition of Smith's Leading Cases, at p. 363, it is said: "In *Sibree* v. *Tripp* (2), the case of *Cumber* v. *Wane* (1) was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount; the circumstance of negotiability making it in fact a different thing and more advantageous than the original debt, which was not negotiable." The rule cannot be better stated than it is in the same note, at p. 366: "The general doctrine in *Cumber* v. *Wane* (1), and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows, viz. that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement." For these reasons, I am of opinion that this appeal must be dismissed, with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *Wills & Watts.*
Solicitors for defendant: *Bates & Jellicorse.*

(1) Str. 426. (2) 15 M. & W. 26.

J. S.

THE QUEEN *v.* THE JUSTICES OF MIDDLESEX. RE ELSDON.

1882
May 2.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 231—*Metropolis Local Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*Justice of the Peace—Appeal—Quarter Sessions—Whether Appeal lies to Quarter Sessions from Order of Justice for Demolition of Building.*

An appeal to quarter sessions will not lie against the order of a justice directing the demolition of buildings under s. 75 of the Metropolis Local Management Amendment Act, 1862.

By s. 231 of the Metropolis Local Management Act, 1855, any person aggrieved by any adjudication of a justice "with respect to any penalty or forfeiture under the provisions of the Act" may appeal to quarter sessions.

By s. 75 of the Metropolis Local Management Amendment Act, 1862 (which, by s. 110, is to be construed as one Act with the Act of 1855), where a building is erected beyond the general line of buildings in a street without the consent of the Metropolitan Board of Works, a justice of the peace is empowered, upon complaint made and after inquiry held as the Act directs, to order the owner or occupier to demolish the building, and in default of compliance with the order the vestry of the parish or Board of Works for the district shall demolish the building, and may remove and sell the materials, and recover the expenses of so doing from the owner or occupier:—

Held, that the order of a justice directing the demolition of a building under s. 75 of the Act of 1862, was not an adjudication "with respect to a penalty or forfeiture" within s. 231 of the Act of 1855, and therefore that no appeal to quarter sessions would lie against the order.

MOTION for a rule nisi calling upon the justices of Middlesex at quarter sessions to shew cause why a mandamus should not issue, commanding them to hear and determine an appeal against the order of a metropolitan police magistrate.

Upon a complaint made, under s. 75 of the Metropolis Local Management Amendment Act, 1862 (1), against the applicant for

(1) By s. 75 of the Metropolis Local Management (Amendment) Act, 1862, "No building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street . . . in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds fifty feet . . . such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building . . . be erected without such consent . . . it shall be lawful for the vestry of the parish or the Board of Works for the district in which such building is situate to cause to be made complaint

1882

THE QUEEN v. JUSTICES OF MIDDLESEX.

having erected, as owner, a building beyond the general line of buildings in the street contrary to the provisions of the section, a police magistrate made an order under the section directing the demolition of the building.

The applicant having entered an appeal to quarter sessions against this order, the appeal came on for hearing and the sessions, upon an objection to the jurisdiction being taken by the respondent's counsel, refused to exercise jurisdiction.

Channell, for the applicant. An appeal will lie against the order under s. 231 of the Metropolis Local Management Act, 1855. The order is an "adjudication or determination in respect of a penalty or forfeiture" within s. 231. If any fine, however small, had been imposed it is clear there would be an appeal; it is a startling result if no appeal lies where the owner's house may be pulled down, and the materials removed and sold. It is

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thereof before a justice of the peace who shall thereupon issue a summons, requiring the owner or occupier of the premises . . . to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier . . . directing the demolition of any such building, . . . or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing; and in default of the building complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates, and demolish the building . . . complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same, as they think fit; and all expenses incurred by the said vestry or board in carrying out the said order and in disposal of the said materials may be recovered from the owner or occupier of the premises by action at law, or in a summary manner before a justice of the peace, at the option of the said vestry or board."

By s. 110 "this Act and (inter alia) the Metropolis Management Act, 1855, shall be construed together as one Act."

By s. 231 of the Metropolis Local Management Act, 1855, "If any person feel aggrieved by any adjudication or determination of any justice or justices with respect to any penalty or forfeiture under the provisions of this Act, such party may appeal to the general or quarter sessions."

conceded that the words "penalty or forfeiture" in the Act of 1855 mean "money penalty or forfeiture," but it is contended that the legislature intended "penalty or forfeiture" to have a wider meaning, which would include this case, when applied to the subsequent Act of 1862.

LORD COLERIDGE, C.J. I am of opinion that this rule should be refused. I am conscious that the question argued before the Court is an important one, but my mind is clear upon it, and I do not think it well to encourage any doubt where I feel none.

I am of opinion that there is no appeal against the order of a justice, made under s. 75 of the Metropolis Local Management Amendment Act, 1862, for the demolition of a building brought out beyond the general line of the street. Having regard on the one hand to the interest of the public, and on the other to the small amount of property affected, I do not think it is a very strong or unreasonable enactment. It is a very beneficial one as regards the public, and if used against an individual, does not in any ordinary or reasonable sense cause "forfeiture" of his property. Part of his property no doubt may be taken away, but he obtains a sort of compensation in the increased value of that which remains in his hands.

Now s. 75 does not give an appeal in terms. The question then arises whether the appeal given by s. 231 of the Metropolis Local Management Act, 1855, applies. It was properly admitted that the words "penalty or forfeiture" in s. 231, mean money penalty or forfeiture only, and that if the question rested upon the earlier Act alone, it could not be contended that, under these words, an appeal would lie against an order for the demolition of a building. But it is said to be at least arguable that "penalty or forfeiture," should be construed with respect to the Act of 1862 as having a different meaning, which would include the present case, and that, reading the two Acts together, the provisions of s. 231 as to an appeal apply to the present case. I think the words "penalty or forfeiture," have precisely the same sense in the later as in the earlier Act. Sect. 102 of the later Act makes provisions for the recovery of penalties or forfeitures imposed by that Act, and uses the very

1882

THE QUEEN v. JUSTICES OF MIDDLESEX.

same words as are used in s. 227 of the earlier Act. It being admitted that "penalty or forfeiture" in the earlier Act would not include this case I think it is a very strong argument, when exactly the same words are used with respect to the recovery of penalties and forfeitures in the later Act, that "penalty or forfeiture" mean the same thing in the later as in the earlier Act, and therefore do not include this case. It is a well-known rule that express words are necessary in a statute to give an appeal, and I can find no such words in either of these Acts.

GROVE, J. I am of the same opinion. It is said to be a hardship that an appeal should not lie from the justice's order to demolish part of a building, although where a small fine is imposed an appeal is given. But looking at the Acts of Parliament, I entertain no reasonable doubt upon the construction of them. In the earlier Act, the words "penalty or forfeiture" are in all cases used as meaning money penalty or forfeiture. In my opinion these words have the same meaning in the second Act. If Mr. Channell's argument be correct a much wider signification would be given to them in the second Act than in the first. They would include all forfeitures of a person's estate—all cases in which he suffered in person or property. I think we should be legislating, and not interpreting the Act of 1862, if we acceded to that argument. I agree with my Lord that this rule should be refused.

Rule refused.

Solicitors for applicant: *Last & Sons.*

W. A.

GORDON *v.* JENNINGS. 1882

THE CARDIFF DISTRICT AND PENARTH HARBOUR TRAMWAYS COMPANY, GARNISHEES. *May* 10.

Attachment of Debts—Garnishee Order—Wages Attachment Abolition Act, 1870 (33 & 34 *Vict. c.* 30), *s.* 1—*Salary of Secretary attachable.*

The salary of a secretary to a company amounting to 200*l.* a year is not "wages" of a "servant" within the Wages Attachment Abolition Act (33 & 34 Vict. c. 30) and is therefore not exempted from attachment by that Act.

APPEAL from the order of a judge at chambers dismissing an appeal from an order made by the district registrar at Cardiff for the attachment in execution of a sum of 50*l.*, being a debt due to the defendant, against whom judgment had been recovered, from the garnishees.

It appeared that the judgment debtor was employed as secretary to the garnishees' company, that his duty was to attend at their office daily, to keep their accounts, and generally perform the duties of a secretary, and that his remuneration was a salary of 200*l.* a year, payable quarterly. The 50*l.* attached was a quarter's salary due to him as such secretary.

Lamaison, for the judgment debtor, moved by way of appeal. This debt is not subject to attachment by virtue of the provisions of the Wages Attachment Abolition Act (33 & 34 Vict. c. 30), s. 1. By that Act it is enacted that after the passing of the Act no order for the attachment of the wages of any servant, labourer, or workman shall be made by the judge of any court of record or inferior court. It is admitted that the word "servant," as used in this Act, cannot be construed in its broadest sense, but it is contended that such a servant as the judgment debtor comes within it. The intention was to exempt the wages of persons earning only sums of moderate amount essential to their daily subsistence. A person in the position of the judgment debtor is fairly within the scope of the Act. It is submitted that the wages of a clerk would be within the Act. It is not because the employment and its remuneration in this case are called by the more pretentious names of "secretary" and "salary" that the case is to be excluded if really within the scope of the Act. The amount earned here is

1882

GORDON v. JENNINGS.

really not so much more than might be earned sometimes by persons coming within the term "workman."

G. B. Hughes, for the judgment creditor, was not called upon to shew cause.

GROVE, J. I am of opinion that the order of the judge was correct. We must construe the word "servant," as used in this Act, having regard to the subject-matter and the intention of the Act, and also its collocation with other words. In one sense a secretary of state is a servant, but obviously the statute cannot be meant to apply to every person who may be called a servant in any sense of the term. The intention of the Act is to abolish the attachment of "wages." Now it may be that the term "wages," according to the etymological meaning of the word, may be correctly applied to any remuneration for services, but it seems to me that the popular signification must be looked to. The term "wages" is not applied to the remuneration of a high or important officer of the state or a company, for instance, but to that of domestic servants, labourers, and persons of a similar description. Taking the collocation of the word "servant" with "workman" and "labourer," it is obvious that the reasonable application of the Act is to persons of small means—to servants, such as labourers and workmen receiving small wages at short periods. What is the position of the judgment debtor here? He is a secretary paid a salary of 200*l.* a year by quarterly payments. I do not think his position and remuneration can be said to come within the same description as those of menial servants or labourers. His salary is more than sufficient to keep life up; his salary and employment are such as many persons in the position of gentlemen are sometimes glad to get. No doubt cases might arise in which it would be difficult to draw the line, but I am clearly of opinion that this case is not within the Act.

LOPES, J. I also think the decision of the judge was right. The question is whether the judgment debtor was a "servant, labourer, or workman" receiving "wages" within the meaning of the Act. It is important to consider the object of the Act in order to determine this question. It seems obvious from the terms used that the object was to except from the liability to

attachment of debts the case of persons who would be likely to be deprived of their daily means of subsistence by having their earnings attached in the hands of their employers. I do not think that a person in the position of the judgment debtor comes within the language or the spirit of the Act. To be within the Act I think a person must be earning what would be popularly called "wages." For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitor for judgment creditor: *H. E. Sullivan.*
Solicitor for judgment debtor: *Thomas Hulbert.*

E. L.

THE QUEEN *v.* DYOTT AND OTHERS, JUSTICES OF STAFFORDSHIRE, AND R. T. K. LEVETT. *May* 22.

Poor—Poor-rate—Notice—Publication — Extrâ-parochial Places—Publication of Poor-rate in Parishes where no Church or Chapel—17 *Geo.* 2, *c.* 3, *s.* 1 —7 *Wm.* 4 *&* 1 *Vict. c.* 45, *s.* 2—20 *Vict. c.* 19, *s.* 1.

By 17 Geo. 2, c. 3, s. 1, public notice of every rate for the relief of the poor shall be given in the parish church the next Sunday after the allowance of the rate by the justices, "and no rate shall be esteemed or reputed valid and sufficient so as to collect or raise the same unless such notice shall have been given;" and by 7 Wm. 4 & 1 Vict. c. 45, a written notice, to be affixed on the doors of all the churches or chapels in the parish, is substituted for any notice theretofore by any law or statute given in churches or chapels. By 20 Vict. c. 19, s. 1, every extrâ-parochial place wherein no rate is levied for the relief of the poor shall for all purposes of assessment to the poor-rate and the relief of the poor "be deemed a parish."

The overseer of a parish which, before the passing of 20 Vict. c. 19, was an extrâ-parochial place, made a rate for the relief of the poor, but did not publish any notice of the rate within the parish, in which there was no church or chapel:—

Held, that the rate could not be collected.

RULE, obtained by the overseer of the poor of the parish of Hopwas Hays, in Staffordshire, calling upon certain justices of the peace of Staffordshire and R. T. K. Levett to shew cause why the justices should not issue a distress warrant to enforce payment by Levett of the amount of a rate made for the relief of the poor of the parish.

Hopwas Hays was, until the passing of 20 Vict. c. 19, an extrâ-

1882

THE QUEEN v. DYOTT.

parochial place, and by virtue of that Act became a parish for the purposes (amongst others) of the relief of the poor.

In 1864 the parish was added to the Tamworth Union.

In October, 1881, the overseer of the poor of the parish of Hopwas Hays made a rate to cover arrears of calls for contribution to the Tamworth Union, and Levett was assessed in the sum of £47.

The parish contains no church or chapel, and but one house, a gamekeeper's lodge.

There was no publication of the rate within the parish of any kind.

Levett having been summoned before the justices to shew cause why he should not pay the amount of his assessment, they dismissed the summons.

A. Glen, for R. T. K. Levett, shewed cause. The rate could not be collected because there was no publication within the parish. By 17 Geo. 2, c. 3, s. 1 (1), public notice of the rate is a condition precedent to its validity. There must be publication of some kind within the parish, or there could be no appeal against the rate to quarter sessions. It is not necessary to contend that no rate could be enforced in places which were extrâ-parochial before the passing of 20 Vict. c. 19, and in which

(1) 17 Geo. 2, c. 3, s. 1, after reciting that "great inconveniences do often arise in parishes, townships and places by reason of the unlimited power of the churchwardens and overseers of the poor, who frequently on frivolous pretences and for private ends make unjust and illegal rates in a secret and clandestine manner" enacts that "churchwardens and overseers or other persons authorized to take care of the poor in every parish, township, or place shall give or cause to be given public notice in the church of every rate for the relief of the poor, allowed by the justices of the peace, the next Sunday after the same shall have been so allowed; and that no rate shall be esteemed or reputed valid and sufficient, so as to collect and raise the same, unless such notice shall have been given."

By 7 Wm. 4 & 1 Vict. c. 45, s. 2, all notices, which under or by virtue of any law or statute have been heretofore given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof shall, previously to the commencement of divine service on the several days on which such notices have been heretofore given in the church or chapel of any parish or place, be affixed on or near to the doors of all the churches or chapels within such parish or place, and such notices when so affixed shall be in lieu of and as a substitution for the notices heretofore given as aforesaid, and shall

there is no church or chapel. Possibly in such cases publication in some other approximate mode might be sufficient. 7 Wm. 4 & 1 Vict. c. 45, only alters the mode of publication provided by 17 Geo. 2, c. 3. *Finney* v. *Godfrey* (1) is no authority in favour of the overseer.

[He also referred to *Sibbald* v. *Roderick* (2), and *Reg.* v. *Marriott* (3).]

W. G. Harrison, Q.C., and *Masterman*, for the overseer, supported the rule. Before the passing of 17 Geo. 2, c. 3, a rate was good without any publication at all. The true construction of that Act is that no rate should be esteemed valid in any of the places dealt with by the Act unless the notice was given. The 7 Wm. 4 & 1 Vict. c. 45 only applies to that class of notices which, at the time of the passing of the Act, were to be published in churches or chapels, and therefore, does not affect the question. If the opposite contention prevailed the object of 20 Vict. c. 19, which was passed to bring extrâ-parochial places within the rating Acts, would be wholly defeated where those places contained no church or chapel, for no rate could then be levied in them. Sect. 9 of 20 Vict. c. 19, shews that the legislature contemplated the existence of places without any church or chapel. A condition precedent which is physically incapable of performance cannot be imported into the Act. The judgment of James, V.C., in *Finney* v. *Godfrey* (1) is an authority in favour of this view.

GROVE, J. It is impossible to escape from the express prohibitory words of 17 Geo. 2, c. 3, and I am of opinion that the Court must give effect to them and discharge this rule. It would be making legislation, and not interpreting the language of the statutes, were the Court to say that the rate could be levied without any previous publication. It may be that where the

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be good, valid, and effectual to all intents and purposes whatsoever.

By 20 Vict. c. 19, s. 1, every place which is or is reputed extrâ-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate, the relief of the poor, &c., be deemed a parish for such purposes, and the justices of the peace having jurisdiction over such place, or over the greater part of it, may appoint overseers of the poor therein.

(1) Law Rep. 9 Eq. 356.

(2) 11 Ad. & E. 38.

(3) 12 Ad. & E. 779.

BIBL. LONDIN

1882

THE QUEEN v. DYOTT.

language of a statute is merely directory, and it is impossible to follow the direction, the Court would give effect to the doctrine of "cy-près," and say that the direction should be carried out as nearly as possible. The maxim "nemo tenetur ad impossibilia" would then apply. But in the present case the words of the statute are not directory, but positive and prohibitory. Sect. 1 of 17 Geo. 2, c. 3, after stating the existence of strong reasons for the enactment which follows, provides that publication of notice in the church shall be necessary, and that "no rate shall be esteemed or reputed valid and sufficient so as to collect and raise the same unless such notice shall have been given." That statute was passed before extrâ-parochial districts were subject to poor-rates, and in 20 Vict. c. 19, applying rating powers to these districts, there is no provision, either original or substituted, with respect to publication. The cy-près doctrine does not apply. We have not to decide whether the rate would have been good if published on the only existing house, or some other prominent place, in the parish, because no such thing was done; we have to decide whether the prohibitory enactment in 17 Geo. 2, c. 3, can be wholly done away with. I am of opinion that it cannot. Neither 7 Wm. 4 & 1 Vict. c. 45, which alters the mode of publication, nor 20 Vict. c. 19, repeal the Act of Geo. 2, by which publication is made necessary. Very likely a provision for publishing a rate in places where there is no church or chapel was omitted from these statutes through a slip, but, if so, it is for the legislature to remedy it. It would be very dangerous and going beyond the office of the judge to practically repeal the provisions of the statute of Geo. 2, so far as regards districts which contain no church or chapel. I do not think that the case of *Finney* v. *Godfrey* (1) applies. There were no prohibitory words in the statute in question there—no provision in the negative that unless the thing directed to be done was done the order for appearance would be of no effect. Besides the application was "ex parte," and James, V.C., simply directed publication of the order in what he thought, without having heard argument, would be a sufficient manner. I am of opinion that the rule should be discharged.

(1) Law Rep. 9 Eq. 356.

NORTH, J. I am of the same opinion. The question depends upon the statutes 17 Geo. 2, c. 3, and 20 Vict. c. 19; for 7 Wm. 4 & 1 Vict. c. 45, does no more than substitute a notice affixed to the church and chapel doors for the public notice to be given in church provided by the statute of Geo. 2.

By s. 6 of 20 Vict. c. 19, the overseers appointed under the Act are to be subject to all the obligations to which overseers then or thereafter might be liable. One of those obligations is to observe the provisions of 17 Geo. 2, c. 3, and that Act therefore applies to overseers appointed, under 20 Vict. c. 19, in places without any church. It is to be observed that s. 9 of 20 Vict. c. 19, enacts that, "where any extrâ-parochial place has belonging to or within it any church or chapel" the bishop may authorize the publication of banns there, shewing that the legislature contemplated that there might be an extrâ-parochial place without any church or chapel. The question being whether the statute is to be treated as one in which notice has been deliberately dispensed with or has escaped observation, I come to the conclusion that it has escaped observation. It is a "casus omissus" from which no inference can be drawn against the necessity of notice. In *Finney* v. *Godfrey* (1) the statute contained no prohibitory words, and the direction given by James, V.C., as to posting the notice was by way of advice merely. The order for appearance was in the nature of an order nisi; no final decree could have been drawn up on the bill without the leave of the judge, and the defendant would have been obliged to have notice given him of what had taken place, and could have had the matter brought into Court and argued. Under these circumstances, the Vice-Chancellor may have felt himself at liberty to give a more liberal construction to the statute than if his decision had been an absolute one. I think the case has no application.

Rule discharged.

Solicitors for overseer: *Maples, Teesdale, & Co., for J. Shaw, Tamworth.*

Solicitors for R. T. K. Levett: *Pitman & Son, for Argyle & Son, Tamworth.*

(1) Law Rep. 9 Eq. 356.

W. A.

1882
April 3.

[IN THE COURT OF APPEAL.]

BROWN *v.* NORTH.

Practice—Married Woman suing separately—Security for Costs—Order XVI., rule 8.

8 QBD 18

The rule as to giving security for costs before a married woman can be allowed to sue separately under Order XVI., rule 8, is the same as in the ordinary case of giving security for costs by an appellant, and therefore she is to give such security if she has no available means to pay the costs if she loses, but not where she has such means.

APPEAL by the plaintiff from an order of the Queen's Bench Division, by which all further proceedings in this action were ordered to be stayed until the plaintiff should give security for costs to the satisfaction of one of the masters.

The plaintiff was a married woman living apart from her husband, and she brought this action without her husband or a next friend, having obtained an order of a master allowing her to do so, pursuant to Order XVI., rule 8. (1) The defendant afterwards applied for an order to stay proceedings until the plaintiff gave security for costs, but the master, before whom the application came, refused to make such order, and on appeal his refusal was affirmed by Williams, J., at chambers. The defendant then appealed to the Court, and the Queen's Bench Division made the order now appealed from by the plaintiff.

It appeared from the affidavits that the plaintiff was possessed of an income from the sum of 1500*l.* settled to her separate use, but without power to charge or anticipate the same. Besides such money she was entitled to 1000*l.* lent to her brother on the mortgage of certain patents. She was also possessed of furniture to the value of 500*l.*, and of jewelry to the value of 2000*l.*, all of which she stated was in her possession and for her own separate use.

March 11. *H. P. Reed* (*C. Russell, Q.C.*, with him), for the

(1) By Order XVI., rule 8, "married women may, by the leave of the Court or a judge, sue or defend without their husbands and without a next friend on giving such security (if any) for costs as the Court or a judge may require."

plaintiff. As the plaintiff has property sufficient to answer her liability for costs, the Queen's Bench Division ought not to have made this order requiring her to give security for costs. It is not imperative that security for costs should be given to enable a married woman to sue without joining her husband or a next friend: *Martano* v. *Mann.* (1) And in *Noel* v. *Noel* (2) a married woman was allowed under Order XVI., rule 8, to defend separately without giving security for costs.

A. Wills, Q.C., and *J. Vesey Fitzgerald*, for the defendant. Married women, but for Order XVI., rule 8, would have no right to sue separately, and under that rule it is left to the discretion of the Court to allow them to do so and on what terms, and this Court will not alter what the Divisional Court has in the exercise of its discretion ordered, unless it clearly appears that it has done so wrongly. The plaintiff really has not such property as would be available for the defendant's costs if the defendant should succeed in the action. Part of her property is in strict settlement without power of anticipation, and the rest would in all probability be not forthcoming should the defendant have to enforce any claim for costs.

Cur. adv. vult.

April 3. BRETT, L.J. In this case an order was made on the plaintiff, a married woman, to give security for costs, that order having been made under the rule which is applicable to the case of married women. It appeared from the affidavits that the married woman here had certain property of her own, but which was settled to her separate use, without power of anticipation. Out of that she could not properly pay costs. But it was said in the affidavits that she also had other property of her own which she was entitled to for her separate use, but as to which there was no limitation as to anticipation, and which therefore might be liable for the payment of costs. That was not contradicted on the other side, and the judges in the Court below accepted the fact that she had money available to pay costs; but nevertheless they made the order that she should give security for costs. It struck us at the time that such order was made on a wrong

(1) 14 Ch. D. 419. (2) 13 Ch. D. 510.

1882

BROWN v. NORTH.

principle, and we took time, therefore, to consult with the other members of the Court of Appeal in order that we might state what in our view is the general rule which should be followed in reference to a married woman giving security for costs under such an order as the one in question. We thought that the rule should be the same as that in the ordinary case of giving security for costs by an appellant; of course there may be special circumstances, and we do not attempt to lay down a hard and fast rule which never can be departed from, but the ordinary rule is this, that if it is stated and not denied that the appellant has no means to pay the costs of the respondent, then the appellant must give security for those costs. That being the general rule, subject to exceptions in certain cases, the Court sees no reason why it should be departed from in the case of a married woman. If she has no available means she cannot be allowed to put another person to the expense of litigation upon the terms that if she succeed she shall be paid her costs, but if she does not succeed she shall not pay costs. As a general rule, therefore, if she has no available means, and will go to law, she must give security for costs. But if she has available means to pay costs if she loses, the Court cannot see any reason for adopting a different rule in her case to that which is followed in the ordinary case, and she ought not, the Court thinks, in that case to be obliged to give security for costs. We therefore differ from the judges below and the appeal must be allowed.

HOLKER, L.J. As a general rule an appellant who has no money is obliged to give security for costs, but where the appellant has money no such obligation arises. It seems to me that there is no reason for the variation of that rule in the case of married women, and therefore that the order of the Court below ought to be reversed.

Appeal allowed.

Solicitor for plaintiff: *W. B. Harte.*
Solicitors for defendant: *Jacobs & Vincent.*

W. P.

[IN THE COURT OF APPEAL.]

1882
May 5.

TURNER *v.* BRIDGETT.

WRIGHT, CLAIMANT.

Practice—Interpleader—Summary Decision—Reference by Judge at Chambers to the Court—Appeal—Common Law Procedure Act, 1860 (23 & 24 *Vict. c.* 126), *ss.* 14, 17.

A judge at chambers referred an interpleader summons to a Divisional Court. The Court barred the claimant and decided the case without ordering an interpleader issue:—

Held, that such decision was given in exercise of the summary jurisdiction of a Court or judge under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 14, and was therefore final and without appeal.

THE claimant, who was the trustee in liquidation of the defendant, against whom judgment had been signed and execution issued by the plaintiff, claimed to be entitled to the proceeds of a levy made under such execution, and an interpleader summons was taken out which came on before Stephen, J., at chambers, and was referred by him to the Court. The Queen's Bench Division accordingly heard and determined the matter, and by their judgment they barred the claimant. The case is reported 8 Q. B. D. 392.

The claimant appealed.

April 5. *W. G. Harrison, Q.C.*, and *C. Dodd*, for the claimant.

Charles, Q.C., and *Yelverton*, for the execution creditor, took the preliminary objection that no appeal would lie. As this case arises out of an interpleader application it is governed by the Interpleader Act (1 & 2 Wm. 4, c. 58), and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), ss. 14, 17. The 14th section gives power to the Court or judge to dispose of certain interpleader claims in a summary manner, and in such case, by s. 17, the decision of the Court or judge is to be final. As stated in Lely & Foulkes Judicature Acts, 3rd ed. p. 491, in their note on this 17th section, there is no provision corresponding to s. 4 of 1 & 2 Wm. 4, c. 58, which gave power to the Court to

1882

TURNER v. BRIDGETT.

rescind or alter every order made under that Act by a single judge not sitting in open Court. It has been held in *Dodds* v. *Shepherd* (1), that where a judge at chambers disposes of the merits of an interpleader in a summary manner under the 14th section of the Common Law Procedure Act, 1860, his decision is by s. 17 final, and that there is no alteration in this respect by ss. 19 and 50 of the Judicature Act, 1873, taken together with Order I., rule 2, which expressly preserves the procedure and practice used by the Common Law Courts under the Interpleader Acts (1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126). In this case the Divisional Court to whom this case had been referred acted instead of the judge at chambers, and so disposed of the case summarily, and their decision was, therefore, according to s. 17, final and without appeal.

W. G. Harrison, Q.C., and *C. Dodd*, contrà. In *Ex parte Streeter, In re Morris* (2), Jessel, M.R., says: "the ratio decidendi of that case," *Dodds* v. *Shepherd* (1), "appears to be inconsistent with that of the House of Lords in the subsequent case of *Garnett* v. *Bradley*. (3) And, moreover, if *Dodds* v. *Shepherd* (1) was rightly decided, the provision of s. 20 of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), would have been unnecessary." The case itself of *Ex parte Streeter, In re Morris* (2), it must be admitted was not a decision on the Interpleader Acts, but as to the right of appeal in bankruptcy. The decision of the Queen's Bench Division in the present case was not given in a summary manner. The matter was referred by the judge at chambers under s. 5 of 1 & 2 Wm. 4, c. 58, and the Court were thereupon authorized by that section "to hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a judge."

[BRETT, L.J. If the proceeding had originally commenced by rule of Court, would not, according to s. 2, the decision of the Court have been final?]

That section no doubt says, "the judgment in any such action or issue as may be directed by the Court or judge, and the decision

(1) 1 Ex. D. 75. (2) 19 Ch. D. 216, at p. 220.
(3) 3 App. Cas. 944.

of the Court or judge in a summary manner shall be final and conclusive." But it is clear, as has been decided in *Witt* v. *Parker* (1), that an appeal will lie to the Court of Appeal from the judgment in the trial of an interpleader issue. Here there has been a decision on undisputed facts which, under s. 15 of the Common Law Procedure Act, 1860, the judge is empowered to give, as he is also under that section empowered to order a special case for the opinion of the Court, and, as enacted by s. 16, error can be brought upon the judgment upon such special case.

Charles, Q.C., in reply. As stated by counsel in *Ex parte Streeter, In re Morris* (2) the Court of Appeal since *Garnett* v. *Bradley* (3) have, in *Buse* v. *Roper* (4), followed *Dodds* v. *Shepherd*. (5) That case of *Dodds* v. *Shepherd* (5) is not inconsistent with *Witt* v. *Parker* (1), for where the case was not decided summarily there was an appeal in all trials of interpleader issues, and that has not been taken away.

Cur. adv. vult.

May 5. BRETT, L.J. In this case, which came before Lord Justice Holker and myself, there was an interpleader summons which was heard before a learned judge at chambers and referred by him to the Divisional Court. That Court did not order an interpleader issue but decided the case by barring the claim. From that decision an appeal was brought to this Court, when a preliminary objection was taken that no appeal would lie. We took time to consider the matter, and we have now come to the conclusion that the objection must prevail and that there is no appeal, as the sections of the Common Law Procedure Act relating to interpleader are not repealed or altered by the Judicature Acts, which leave them as they were before. The rule to be deduced from the authorities is that upon anything which may occur on the trial of an interpleader issue there is an appeal from the judgment of the judge who tries such issue, either with or without a jury; but that where a judge at chambers, who hears an interpleader summons, does not order an issue but decides the

(1) 46 L. J. (Q.B.) 450. 25 Q.B.D. 78
(2) 19 Ch. D. at p. 220.
(3) 3 App. Cas. 944.
(4) 41 L. T. (N.S.) 457.
(5) 1 Ex. D. 75.

1882

TURNER v. BRIDGETT.

matter in the exercise of the summary jurisdiction given by s. 14 of the Common Law Procedure Act, 1860, his decision is final, and there is no appeal from it. The authorities which were cited before us in the argument draw that distinction, which in truth is the real distinction between the cases in which there is, and the cases in which there is not, an appeal. The only question which remains is whether what was done in the present case was in the exercise of the summary jurisdiction given by the statute. If it had been done by the judge at chambers then there would have been no doubt that it was done in the exercise of such jurisdiction. Is that altered because the judge declined to deal with it at chambers and referred it to the Court? We are of opinion that it is not. A judge at chambers is always acting for the Court, and when he refers such a matter to the Court he only declines to exercise the jurisdiction of the Court, and refers to the Court the summary jurisdiction which he himself has at chambers. When therefore the Queen's Bench Division barred the claimant in the present case, they did so in the exercise of such summary jurisdiction, and so their decision was final and without appeal. Consequently the preliminary objection which was taken must prevail and this appeal be dismissed.

Appeal dismissed.

Solicitors for claimant: *Thomas White & Sons.*
Solicitor for execution creditor: *G. H. Carthew.*

W. P.

[IN THE COURT OF APPEAL.]

1882
March 16.

GIBBS *v.* GUILD.

Limitations, Statute of—Reply of concealed Fraud and absence of reasonable Means of Discovery.

In an action to recover by way of damages money lost by the fraudulent representations of the defendant, a reply to a defence of the Statute of Limitations that the Plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was *held* good by the Court of Appeal (Lord Coleridge, C.J., and Brett, L.J., Holker, L.J., dissenting), affirming the judgment of Field, J.

APPEAL by the defendant from two judgments of Field, J., one overruling a demurrer by the defendant to the plaintiff's replication, and the other allowing a demurrer of the plaintiff to the defendant's rejoinder. The pleadings are fully set out in the report of the case in the Queen's Bench Division (1), and it is sufficient only to state that the action was against the defendant for damages for fraudulent representations alleged in his statement of claim to have been made by the defendant in order to induce the plaintiff to purchase, and by reason of which he was induced to purchase, shares in a company called the Phospho-Guano Company, Limited, which shares were always worthless, and that the plaintiff consequently lost the price he paid for them, namely, 2500*l.* and the interest thereon, and he claimed a sum to cover such loss.

The statement of defence was that the plaintiff's cause of action, if any, did not accrue within six years before the commencement of the action. The replication was, inter alia, that the plaintiff did not discover the fraud, and had not the means of discovering it until within six years next before the commencement of this action, that the existence of and means of discovering such fraud were concealed by the defendant until within such six years, and also that the defendant, in order to prevent the plaintiff from discovering the fraud, actively and deliberately concealed the same until within such six years.

(1) 8 Q. B. D. 296.

1882

GIBBS v. GUILD.

To this replication the defendant demurred, and he also alleged by way of rejoinder that the frauds mentioned in the reply did not accrue within six years before the commencement of the action. The plaintiff demurred to this rejoinder.

Judgment having been so given on these demurrers, in favour of the plaintiff, the defendant appealed.

Petheram, Q.C., and *Ram*, for the defendant. At common law before the Judicature Act, 1873, the replication in this case would have been no answer to the Statute of Limitations: *Imperial Gas Co.* v. *London Gas Co.* (1) and *Hunter* v. *Gibbons.* (2) The action would have been an action on the case, one of the actions expressly mentioned in 21 Jac. 1, c. 16, s. 3, which limits the bringing of it to six years after the cause of such action. In Chancery, before the Judicature Act, the proceedings were not by action, and the Chancery Court therefore did not consider itself bound by the statute, though it acted often by analogy to the statute, and so limited the right of the party to his remedy. "The general principle," says Lord Westbury in *Knox* v. *Gye* (3), "was laid down as early as the case of *Lockey* v. *Lockey* (4), where it was held that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law, no account will be given after the legal limit of six years if the statute be pleaded" . . . . "For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being that where the suit in equity corresponds with an action at law, which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. But if any proceeding in equity be included within the words of the statute, there a Court of Equity like a Court of Law acts in obedience to the statute." To the same effect is the opinion of

(1) 10 Ex. 39; 23 L. J. (Ex.) 303.
(2) 1 H. & N. 459; 26 L. J. (Ex.) 1.
(3) Law Rep. 5 H. L. 656, at p. 674.
(4) Prec. in Ch. 518.

2 Jur NS 1249
(1) 18 Jur 497.

Lord Redesdale in *Hovenden* v. *Lord Annesley*. (1) The Master of the Rolls in *In re Greaves, deceased, Bray* v. *Tofield* (2) says, "the Statute of Limitations did not affect Courts of Equity, because it only applied to what were commonly called common law actions. If any action is properly described by the statute of James, that statute applies to the action now before the Court whether in one Court or another; and the statute is consequently binding upon the High Court." Amongst the authorities relied on in the judgment of Field, J., in favour of the plaintiff are the dicta of Lord Mansfield in *Bree* v. *Holbeck* (3) and of Bayley and Holroyd, JJ., in *Clark* v. *Hougham*. (4) They are, however, only dicta, though of certainly very learned judges, and may be considered to be overruled by *Imperial Gas Co.* v. *London Gas Co.* (5) and *Hunter* v. *Gibbons*. (6) The case of *Blair* v. *Bromley* (7) in which the period of limitation was held in equity to run from the discovery of the fraud, was a case of pure equity in which the plaintiff could have had no remedy in a common law action. The important case in the House of Lords of *Booth* v. *Lord Warrington* (8), on which great reliance is placed as supporting the contention of the plaintiff, is difficult to understand from the meagre way in which it is reported; the answers of the judges are not given to the questions which were put to them, nor are any reasons stated for the decision. It would appear, however, to have been a suit for the recovery back of the money which had been fraudulently obtained from the plaintiff by the defendant, and therefore was very different from an action like the present one, which is for the damages the plaintiff has sustained, and which before the Judicature Acts would have been an action on the case.

T. W. Chitty (*Webster, Q.C.*, and *J. W. Evans*, with him), for the plaintiff. Now since the Judicature Act, this Court should grant the same relief which a Court of Equity could have granted before that Act: (see Judicature Act, 1873, s. 24, sub-s. 7.) *Booth*

(1) 2 Sch. & Lef. 630.
(2) 18 Ch. D. 551, at p. 554.
(3) 2 Dougl. 654.
(4) 2 B. & C. 149.
(5) 10 Ex. 39; 23 L. J. (Ex.) 303.
(6) 1 H. & N. 459; 26 L. J. (Ex.) 1.
(7) 5 Hare, 542; 16 L. J. (Ch.) 105; on appeal, 2 Phill. 359; 16 L. J. (Ch.) 495.
(8) 4 Bro. P. C. 163.

1882

GIBBS v. GUILD.

v. *Lord Warrington* (1) shews that though the facts were such as would have supported an action at common law, yet equity would prevent the Statute of Limitations being relied on as an answer in a case like the present, where the fraud which gave rise to the cause of action had been fraudulently concealed by the defendant. That case is explained by Lord Redesdale in *Hovenden* v. *Lord Annesley* (2), where he points out that until the discovery of the fraud the title to void it does not completely arise, and that the statute runs only from the discovery. With regard to *Hunter* v. *Gibbons* (3), which has been cited on behalf of the defendant, "the question there was" said Fry, J., in *Trotter* v. *Maclean* (4) "merely whether under s. 85 of the Common Law Procedure Act, 1854, fraud could be replied as an equitable answer to a plea of the Statute of Limitations at law." It is clear that in equity the statute would only have run from the discovery of the fraud: *Ecclesiastical Commissioners for England* v. *North Eastern Ry. Co.* (5); *Rolfe* v. *Gregory.* (6) In *Sherwood* v. *Sutton* (7) Story, J., held that the reply of fraudulent concealment until within six years was an answer to the action not having been brought within the six years from the original cause of action, and in *Brown* v. *Howard* (8) Dallas, C.J., says, "in *Bree* v. *Holbeck* (9) it is laid down that in cases of fraud the limitation only runs from the time when the fraud is discovered." The case of *Booth* v. *Lord Warrington* (1) was acted on in the *South Sea Co.* v. *Wymondsell.* (10)

Ram, replied.

LORD COLERIDGE, C.J. I am of opinion that the judgment of the Court below is right and should be affirmed.

The case is one which raises no doubt important considerations. It has been very well argued on both sides, and I have no doubt that every case has been cited which brings anything like relevant law to bear on the subject.

(1) 4 Bro. P. C. 163.
(2) 2 Sch. & Lef. 633.
(3) 1 H. & N. 459.
(4) 13 Ch. D. 574, at p. 581.
(5) 4 Ch. D. 845.
(6) 34 L. J. (Ch.) 274.
(7) 5 Mason, 133.
(8) 2 B. & B. 73, at p. 75.
(9) 2 Dougl. 654.
(10) 3 P. Wms. 143.

1882

GIBBS v. GUILD.

Lord Coleridge, C.J.

The point we have to decide is this. An action is brought, and to my mind it does not very much signify whether it is for the recovery of a specific sum of money or for the recovery of that sum in the shape of damages, the money in the one case having been paid, or the damages in the other having been occasioned, by the fraud of the defendant. The plaintiff says give me back the money which I paid and interest upon it because you, the defendant, got me to pay it by fraudulent misrepresentations. The defendant says, assuming that I did so, I did it more than six years ago, and the statute of 21 Jac. 1, c. 16, which says that no action on the case shall be maintained beyond six years from the time when the cause of action arose, is an answer, because the cause of action accrued here when you parted with your money, and that was more than six years ago. To that the plaintiff replies that though as a general rule the statute would be an answer, yet in this case you, the defendant, have no right to set it up, because you concealed from me your own fraud during those six years, and as you have yourself by fraud made the statute run in your own favour, you cannot now take advantage of it. The question is whether now, since the Judicature Acts, that is an answer to such a defence.

It must be clearly admitted that if we went upon the principles of strict common law actions and strict common law pleadings, there are at least two decisions directly in point in favour of the defendant, that such a replication would not be good, namely, *Hunter* v. *Gibbons* (1) and *Imperial Gaslight Co.* v. *London Gaslight Co.* (2) It is equally, I think, admitted that if this had been a pure equity proceeding before the passing of the Judicature Acts, and had been instituted in the Court of Equity to recover back a sum of money which had been obtained from the plaintiff by a fraud, and the defendant had pleaded the Statute of Limitations, the facts stated in this replication would have been held a sufficient answer to such a defence. This is clearly so, as shewn by the case of *Booth* v. *Lord Warrington* (3), which Mr. Ram, in the very able argument he addressed to us, admitted would be in point and against him if this were a case of pure equity proceed-

(1) 1 H. & N. 459. (2) 10 Ex. 39.

(3) 4 Bro. P. C. 163.

1882

GIBBS v. GUILD.

Lord Coleridge, C.J.

ing. Now it might be sufficient to rely on that case of *Booth* v. *Lord Warrington* (1), because it is a decision of the House of Lords and binding upon this Court, and Mr. Ram, with all his ingenuity, has been unable to distinguish it from the case before us, if the present case is to be looked at as a pure equity proceeding. I agree that case is somewhat unsatisfactorily reported in the extreme brevity of it, and from one having to draw inferences, which, though I do not think they are fairly so, yet may possibly be open to dispute. That case was decided so long ago as the time of Lord Hardwicke, and it has been over and over again treated as a binding authority, and its principles adopted and expounded from time to time by judges of the highest authority.

In the report of the case of *South Sea Co.* v. *Wymondsell* (2), which must have been decided not long after *Booth* v. *Lord Warrington* (1), the facts of *Booth* v. *Lord Warrington* (1) are rather more fully stated than they are in Brown's report, and Lord King, the then Lord Chancellor, who had been a very eminent common law judge, decided *South Sea Co.* v. *Wymondsell* (2) in accordance with and upon the authority of *Booth* v. *Lord Warrington.* (1) In *Bond* v. *Hopkins* (3) and *Hovenden* v. *Lord Annesley* (4), Lord Redesdale, in elaborate judgments, very ably comments on all the cases, which he collects and sets out in their chronological order, and gives a short dissertation upon the principles which have actuated Courts of Equity in administering this exception, as it may be called, on the Statute of Limitations. I apprehend that, to state it shortly, the principle laid down by him is this, the Statute of Limitations does really in a sense bind Courts of Equity as much as it binds the Courts of Law, for this reason, says Lord Redesdale, that equity follows the law; and that in general what are the legal rights will be also the equitable rights of suitors, and in ordinary cases the Statute of Limitations applies, not, he is careful to say, by analogy, but by reason of the obedience which the Courts of Equity owe to the statute; but it has always been the principle of the Courts of Equity, while admitting the existence of legal rights, to take care that the particular suitors before them shall not be allowed to avail themselves of those legal

(1) 4 Bro. P. C. 163.
(2) 3 P. Wms. 143.
(3) 1 Sch. & Lef. 428.
(4) 2 Sch. & Lef. 629.

1882

GIBBS v. GUILD.

Lord Coleridge, C.J.

rights in cases where it would be unjust. I therefore do not agree that Courts of Equity have, in the language in *Hunter* v. *Gibbons* (1), engrafted an exception upon the Statute of Limitations. It all depends, no doubt, upon what is meant by those words. If by engrafting an exception upon the statute is meant that a Court of Equity prevents a particular person from taking advantage of the statute, then no doubt that is true, but if it is meant to say that a Court of Equity by what it has done has altered the terms of the statute, then, with great respect, I demur to it. What I wish to convey is, that I understand the Courts of Equity to deal with the Statute of Limitations as they deal with every other legal right, whether existing by statute or common law, not by abrogating it, but by saying, on principles well understood in those Courts, that in some particular cases it is unjust that the party should be allowed to exercise those rights. They say that where the cause of action and the knowledge of the cause of action are contemporaneous, there the statute runs in Courts of Equity as it runs at common law, but that where the existence of the cause of action is concealed from the person who ought to take advantage of it by the fraud of the person who creates it, such person shall not take advantage of the wrong which he himself has done, and that a fresh cause of action accrues from the moment that the fraud is discovered, and that to that fresh cause of action the Statute of Limitations will be applied by the Courts of Equity.

Now, upon these demurrers I must assume the fact in this case to be that there was a cause of action which had been created more than six years ago; but that the knowledge of the existence of that cause of action was concealed from the plaintiff by the fraud of the defendant until within six years before the commencement of this action. That being so, if this were a pure equity proceeding, it seems to me to follow, from the cases I have cited and from the principles which I understand them to lay down, that the plaintiff would be entitled to succeed. Then the question arises, how is this proceeding to be regarded, is it to be regarded as a common law proceeding in which it must be admitted that the defendant would succeed, or is it to be regarded

(1) 1 H. & N. 459.

1882

GIBBS v. GUILD.

Lord Coleridge, C.J.

as an equity proceeding in which, as I have tried to shew, the plaintiff would be entitled te succeed? Strictly speaking, it is neither; but it is an action in the High Court of Justice created by the Judicature Act of 1873, by which common law and equity in a certain sense were both abolished, that is to say, the right and the principles of both remained, but they were not allowed to exist in conflict with one another, and the High Court of Justice was not only empowered, but was ordered to administer justice according to the principles of law and equity together, and to give relief according to such principles concurrently. It seems to me, therefore, plain that it is fallacious to treat this as if it were either an action at law or a suit in equity before the Judicature Act, 1873. By the operation of that Act each division of the High Court is to administer justice according to so much of the principles of either of the two old conflicting systems as may be necessary to give effectual and complete relief to the suitors before the Court. (1)

Here an action is brought either to recover money back, or for damages, and, for the reasons which I have already given, I do not think it signifies much for which it is brought. To that there is a defence which prior to the Judicature Act, 1873, would have barred this claim at common law, but we are no longer bound by the rules of common law, and we have to see what the Court of Equity would have done in such a case as the present.

It seems to me that, basing myself on the general terms of s. 23, and s. 24, subs. 1, of the Judicature Act of 1873, we are bound to give the relief that a suitor would have had in equity, and to uphold, for the reasons I have given, the validity of this replication. I do not like to conclude what I have said without adverting to the fact that the two cases to which I have referred of the *Imperial Gaslight Co.* v. *London Gaslight Co.* (2), and *Hunter* v. *Gibbons* (3), are not cases binding on this Court. It is not necessary to consider what were the true principles of the old common law pleading as if this had been an old common law action in which fraud was replied to the plea of the Statute of Limitations. It is sufficient to say that such a case is not concluded by any decision in the Court of Appeal, and that there

(1) See *Pugh* v. *Heath*, 7 H. L. (E.) at p. 237, per Earl Cairns.

(2) 10 Ex. 39.

(3) 1 H. & N. 459.

are dicta of judges of very great eminence (I allude to Lord Mansfield, Holroyd and Bayley, JJ.) which make it at least questionable whether even if this had to be looked at as a pure common law action, this Court might not have arrived at the same result as that to which it has now come to.

BRETT, L.J. I am strongly of opinion that the Judicature Act, 1873, has not altered the rights and remedies of any person. All that it has done is to say that the same rights are to be administered as were administered before, and that the same remedies are to be administered as were administered before, but that instead of being administered by two Courts, the remedies shall be administered by the same Court. Inasmuch then as the Judicature Act, 1873, does not alter the rights of any person, it seems to me equally to follow that it does not repeal or alter the effect of any statute which was applicable before to a particular case. It follows from that, as it seems to me, that this Court should administer now every equity which a Court of Equity would have administered, so that if equity would have granted relief in this case, this Court should now grant the same relief. The next proposition to be considered is whether a Court of Equity would have relieved the plaintiff in this case. There was some argument that the first proposition which I have enunciated did not now hold, and it was said that, inasmuch as the names of actions are altered, and there is no longer an action on the case, or an action of trespass, or some other action of that kind, the Statute of Limitations did no longer apply; but I am of opinion that the Judicature Act, 1873, did not alter or touch the Statute of Limitations at all, and that that statute still applies to the circumstances which constituted the actions named in it, that is to say, that if the circumstances would have constituted an action on the case or an action of trespass, although the action which involves the remedy sought would not now be called an action on the case or an action of trespass, yet, notwithstanding, the Statute of Limitations applies to it, if the facts are such as would have supported an action on the case or an action of trespass. The argument in this case and the great contention has been on the subsequent proposition, and it has been strongly argued that the Court of

1882

GIBBS v. GUILD.

Brett, L.J.

Equity would not have relieved in this case and upon this ground, that the facts of this case would have constituted a common law action on the case, that, therefore, the Statute of Limitations applies, and that, if the Statute of Limitations applies, the statute begins to run from the accruing of the cause of action, and that to give effect to the alleged fraudulent concealment in the way it has been suggested would be to alter the statute, and would be contrary to its very words and intention.

Now I think that for the purpose of this case one must consider that before the Judicature Acts there were transactions in which the only remedy would have been by a suit in equity, and there were transactions in which the only remedy would have been at law, and there were other transactions in which the Courts of Equity and the Courts of Common Law claimed a concurrent jurisdiction, so that the person might have what was equivalent to a remedy in either Court. In cases in which the only remedy was in the Court of Equity, but where the transaction was such as was within the meaning of the Statute of Limitations, it is admitted and cannot be denied that the Courts of Equity, whether by analogy, or whether they considered themselves bound by the statute (I think, upon the authority of Lord Redesdale and Lord Mansfield, on the ground that they thought themselves bound by the Statute of Limitations), did recognise the binding authority of the Statute of Limitations, and if there were nothing else but the cause of action, and the cause of action had arisen more that six years before the commencement of the suit, the Courts of Equity interpreted the Statute of Limitations precisely in the same way as the Courts of Law did. But assuming that the Statute of Limitations would be binding, the Courts of Equity, on doctrines of their own, sometimes applied, if other circumstances arose, a particular kind of equity. They did not construe the statute so as to give an equity, they adopted an equity which was quite independent of the statute, but which no doubt had an effect on the transaction notwithstanding the statute, that is to say, they said if the existence of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground

1882

GIBBS v. GUILD.

Brett, L.J.

that the statute was a bar. It seems to me that there is some little confusion in the expressions used in some cases as to the origin of the cause of action being a fraud. That is not the fraud which raised the equity; but if there was a cause of action, and if its existence was fraudulently concealed from the plaintiff by the defendant who had given that cause of action, it was then that the plaintiff's equity arose notwithstanding that his cause of action had arisen more than six years before.

It is not denied that where the only remedy was in equity the Court of Equity would have adopted this particular equity. On the other hand, where the cause of action was one for which the remedy was an action at law, and the Statute of Limitations was pleaded, and it was proposed to answer that statute by a replication that although the cause of action had really accrued more than six years before the beginning of the action, yet that the existence of that cause of action had been fraudulently concealed from the plaintiff by the defendant until within six years, it was held in two cases that such a replication could not be supported. It was held in the *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.* (1), that such a replication could not be supported as a legal replication, and it was held in *Hunter* v. *Gibbons* (2) that it could not be supported as an equitable replication pleaded in a common law court. There is no case which seems to me to have decided whether a Court of Equity would have prevented a defendant under such circumstances from pleading the Statute of Limitations in a Court of Law. All that the judges decided in *Hunter* v. *Gibbons* (2) was that in their judgment a Court of Equity would not have granted an injunction simply and without terms. I venture to doubt the correctness of that decision, and further taking into consideration the doctrine propounded by such great authorities as Lord Mansfield, and Bayley, Holroyd, and Best, JJ., and Dallas, C.J., I doubt whether, even at law, the replication would not in a Court of Appeal be held to be a good replication. It is unnecessary to decide that point in the present case, and therefore I give no opinion as to whether in an action at law such pleading would be a good replication either if treated as a replication at law or if treated as an equitable replication.

(1) 10 Ex. 39. 10 Jur 497 (2) 1 H. & N. 459. 4 Jur NS 1249

1882

GIBBS v. GUILD.

Brett, L.J.

This case, as it seems to me, is one in which before the Judicature Acts there would have been a concurrent remedy in the Courts both of Law and Equity. This action is founded upon an alleged fraud committed by the defendant, and a fraud by which money was obtained from the plaintiff, and the plaintiff seeks to recover back that money and the interest which he would have made upon it if that money had been left in his hands. That such an action would have lain at law cannot be doubted. It would have been an ordinary action, and the plaintiff would have recovered the money he had lost, and interest also, if the jury had chosen to give it. Now would a suit in equity have been maintainable for the same cause of action, and would the remedy in the Court of Equity have been the same? That depends upon what was the decision in the case of *Booth* v. *Lord Warrington*. (1) There the suit was brought in respect of an alleged fraud by which money had been obtained from the plaintiff and the suit was brought for the recovery back of that money, and no question was raised either in the Court of Chancery or in the House of Lords that such a suit was maintainable in a Court of Equity. It was assumed that the original cause of action was one which gave rise to the remedy sought, but the Statute of Limitations was pleaded, and the fraudulent concealment of the cause of action by the defendant within the six years was given as an answer to the defence of the Statute of Limitations. It was argued that because the transaction was one which would have given rise to an action on the case at law, therefore the Statute of Limitations was a bar, and that the statute began to run from the time of the accruing of the cause of action, and, assuming that the remedy was concurrent, as the statute would have been a bar in a Court of Law so also would it be a bar in the Court of Equity. That was the very point taken. The House of Lords thereupon consulted the judges, and asked them three questions. The first question was, "Whether, supposing such a fraud to have been committed as charged by the plaintiff's bill, an action at law might have been maintained and the plaintiff thereby repaired in damages for which he had suffered by reason of the fraud." It not being questioned that a suit in Chancery lay, the question asked was whether it could have

(1) 4 Bro. P. C. 163.

1882

GIBBS v. GUILD.

Brett, L.J.

been maintained in a Court of Law. The judges must have answered that it could, because it seems to me so clear, and I cannot doubt but that they answered the first question in the affirmative. Then the second question was, "Supposing such an action might have been maintained at law at what time the cause of action accrued?" Now in that case the original cause of action was the alleged fraud, and the dispute was whether the cause of action accrued at the time of the fraud or at the time when the money was paid under the fraud. I should suppose that the answer of the judges must have been that, as it is the result only of the fraud which gives the cause of action, therefore the cause of action would accrue when the money was obtained or paid in consequence of the fraud; but then that was more than six years before the plaintiff's suit. Then the third question which was asked was, "Supposing the fraud not to have been discovered till six years after the cause of action accrued, whether a Court of Equity would be barred from giving relief in such case on a bill to be commenced after the six years." That is, inasmuch as by answering the first two questions in the affirmative there would be concurrent jurisdiction in the Courts of Chancery and Common Law, the judges were asked whether in their opinion that would prevent the application of the equitable doctrine in the Court of Equity? The answer, according to the decision of the case, must have been that it did not, and so the House of Lords held. That case seems to me to be directly in point. It establishes I think in a case like the present, that although it be one in which a Court of Equity has concurrent jurisdiction with the Courts of Law, yet a Court of Equity will not be prevented by a plea of the Statute of Limitations from applying its own equity with regard to a fraudulent concealment by the defendant of the accruing of the cause of action. Was that the real meaning of the case of *Booth* v. *Lord Warrington* (1)? It was, I think, so considered by Lord Redesdale in the case of *Hovenden* v. *Lord Annesley* (2), and, as far as I can judge, it has been the accepted doctrine of the Court of Equity from that time to the present. Then, in the case of *Blair* v. *Bromley* (3), which was a suit to recover money

(1) 4 Bro. P. C. 163. (2) 2 Sch. & Lef. 607.

(3) 5 Hare, 542.

1882

GIBBS v. GUILD.

Brett, L.J.

obtained by fraud, the Statute of Limitations, though set up as an answer, was not allowed by Wigram, V.C., to be relied upon by the defendant, because the existence of the cause of action had been concealed from the plaintiff by the fraud of the defendant within six years before the suit. That case was decided upon the authority of *Booth* v. *Lord Warrington* (1), and it was taken on appeal to the Lord Chancellor (Lord Cottenham), who affirmed the decision of the Vice-Chancellor (see 2 Phil. 354.) Therefore besides the decision of the House of Lords there is the decision of the Lord Chancellor sitting as a Court of co-ordinate appeal with this Court in the case of *Blair* v. *Bromley*. (2) It seems then to me that we are bound by authority, which shews not that the Court of Equity construes the Statute of Limitations in any way different from the Court of Common Law, nor that the Court of Equity will not apply the Statute of Limitations when the cause of action has accrued more than six years, but that the Court of Equity in a case like the present would have given the remedy which the plaintiff seeks, and, applying their own equitable doctrine, would have prevented this particular defendant from defeating the plaintiff's claim by means of the Statute of Limitations. That doctrine seems also to have been recognised in the *Southsea Company* v. *Wymondsell*. (3) It is true that the present case might be treated as a common law action, but it is also one which might have been treated before the Judicature Acts as a suit in equity. Under these circumstances, it seems to me that merely because it is brought in the Common Law Division we have no right to say it is not a suit in equity, and if it be a suit in equity then we are bound, by the authorities to which I have referred, to hold that the plaintiff is not deprived of his remedy by reason of the plea of the Statute of Limitations, because the reply sets up an equity to which effect would be given by a Court of Equity. Therefore it seems to me that the judgment of my Brother Field was correct and ought to be affirmed.

HOLKER, L.J. I have the misfortune to be obliged to differ from my Lord and Lord Justice Brett, and I regret it for two

(1) 4 Bro. P. C. 163. (2) 5 Hare, 542.
(3) 3 P. Wms. 143.

1882

GIBBS v. GUILD.

Holker, L.J.

reasons. First of all, because I am bound to admit that they take what would be considered a broader view of this matter than I do, and, secondly, because as I differ I probably may be wrong. However I have formed a strong opinion upon this case, and I think I am bound to give utterance to it. The question here is how we are to ascertain from what period the Statute of Limitations begins to run in a case like the present. On the one hand it is said that the Statute of Limitations runs from the period mentioned in the statute itself, namely, the accruing of the cause of action, whilst on the other hand it is contended that we are to disregard the language of the statute and to say that the statute runs from the time when the fraud has been discovered, at all events in all cases where the fraud has been concealed by the further fraud of the man who originally perpetrated the fraud. In dealing with this question it may be important to ascertain how the law stood before the passing of the Judicature Acts. A great many cases have been cited, but I think when they are considered it will be apparent that there really is not any difference with respect to what the law was. I think it will be found that the Courts of Common Law dealing with actions which are within the language and meaning of the Statute of Limitations acted directly upon the language of that statute, and decided that the statute should not be a bar until the lapse of six years after the cause of action had arisen, and that the cause of action in a case like this was the fraud and not the discovery of it. It may be a piece of imperfect legislation; but the legislature having said that the action is barred after six years from the accruing of the cause of action we must adopt that, and we cannot make legislation for ourselves.

That was the doctrine of the Courts of Common Law as laid down in a great many cases, and it is enough to mention only two of the most recent ones: *Hunter* v. *Gibbons* (1) and the *Imperial Gaslight and Coke Co.* v. *London Gaslight Co.* (2) They were decided by very eminent judges, and I take it as clear, as decided by those cases and several others, that the rule of the common law was what I have stated it to be. The rule in equity was different. With reference to *Booth* v. *Lord Warrington* (3),

(1) 1 H. & N. 459. (2) 10 Ex. 39. (3) 4 Bro. P. C. 163.

1882

GIBBS v. GUILD.

Holker, L.J.

which has been so much relied on, I know not whether it was rightly decided or not, but it is very vaguely reported, and as so reported it is very difficult to understand. Of course I must assume that it was rightly decided, and as a decided case in the House of Lords it is binding upon me as a member of this Court, but let me point out that it was not a common law case at all, but an equity decision, and it enunciated the rule adopted in equity only. It may be that *Booth* v. *Lord Warrington* (1) is not a decision such as supposed. It may be that the House of Lords imagined that there was no sufficient remedy at law (although I am bound to say I should not think so myself), and that the only remedy was in equity, and that there was no remedy in equity which came within the language of the Statute of Limitations. It is enough for me to say that *Booth* v. *Lord Warrington* (1) and the cases which followed it cannot disturb the cases which I have cited, because really it was a decision as to the law administered and the rule adopted in the Court of Equity and not in the Court of Common Law.

Before the passing of the Judicature Acts the Common Law Courts considered themselves bound by the Statute of Limitations, and they decided according to the language of the Statute of Limitations and disregarded any equitable consideration. The Equity Courts took a different and, it may be said, a far more liberal view of the matter, and in some cases at all events said that it was very unjust to hold that the Statute of Limitations ran from the arising of the cause of action, and because it was unjust they decided that in cases of fraudulent concealment, and I think perhaps also (although this is not so clear) that in cases of concealed damage the Statute of Limitations ran from the time that the fraud was discovered. That was adopted in some cases, but I do not think it was the doctrine of the Courts of Equity in all cases, because I think the authorities shew that, wherever there was a proceeding in equity which came within the description of the proceeding mentioned in the Statute of Limitations, there the Courts of Equity held themselves to be just as much bound by the strict language of the statute as the Courts of Law were, for acts of parliament are

(1) 4 Bro. P. C. 163.

omnipotent, and are not to be got rid of by declarations of Courts of Law or Equity. In some cases although the proceeding in equity was not within the language or spirit of the Statute of Limitations yet nevertheless the Courts of Equity have said that there shall be a limitation, and though we are not bound by the Statute of Limitations yet we will act upon the spirit of the statute, and in analogy to it hold that a man who has been guilty of laches for a considerable time shall be barred of his remedy. In dealing however with various matters which came before them the Equity Courts have said, and said naturally, that they will not extend this rule, which is not a piece of legislation, but a rule they have made for themselves by analogy to the statute, to cases in which by doing so they would work a grievous injustice. Thus in the case of a proceeding not within the Statute of Limitations, where the question has arisen whether the statute shall run from the perpetration of a fraud or from its discovery, the Courts of Equity have said the statute shall run from the discovery. Therefore there are those two doctrines which are inconsistent with each other in a sense. The rule of the common law with reference to ascertaining when the statute shall begin to run, and I will add, though with some hesitation and doubt, the rule also of the Courts of Equity in cases which were within the Statute of Limitations; and in both of these the statute began to run from the time when the cause of action arose. In other cases in equity where the Courts of Equity acted only upon the analogy of the Statute of Limitations and did not admit themselves to be actually bound by it, the rule was the other way, and that the statute ran from the discovery of the fraud and not from its perpetration. I have very little more to add. The important question is whether the rule of law, and let me add the rule of equity in cases to which the Statute of Limitations applies, is to be followed or not; in other words, whether by the decision of this Court we are to repeal the Statute of Limitations. The present case is in effect an action on the case to recover back money obtained by fraud, and it is proposed to declare by a decision of a Court of justice that the rule which the Statute of Limitations has established shall be done away with, and that where that Statute of Limitations says that the statute shall begin to run from the

1882

GIBBS v. GUILD.

arising of the cause of action, which is when the fraud itself was committed, this Court is to declare that instead of that the statute shall begin to run from the discovery of that fraud. I am therefore unable to concur with the other members of this Court that the judgment should be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *R. Miller & Wiggins.*
Solicitors for defendant: *Clarke, Rawlings, & Clarke.*

W. P.

April 3.

STONE *v.* HYDE.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 7—*Notice of Action.*

The notice of action under s. 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), need not be expressed in strictly technical language: it is enough if it substantially conveys to the mind of the person to whom it is given, the name and address of the person injured, and the cause and date of the injury.

A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg:"—

Held, that having regard to the proviso at the end of s. 7 the defect in the notice did not render it invalid.

ACTION under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), for personal injury sustained by the plaintiff whilst in the employ of the defendant. The cause came on to be tried in the Lambeth county court, with a jury, on the 7th of March last, when, in order to prove a notice under s. 7 of the Act, the plaintiff's solicitor put in the following letter:—

"13 December, 1881.

"To Mr. Hyde,

"Sir,—Mr. Stone of 193 St. George's Road, Peckham, has consulted me respecting the injuries sustained by him while in your employ on the 19th of November last, and also respecting the improper manner in which he was discharged by you.

"He is now, and has for some time past been, under medical treatment at Guy's Hospital as out-patient, particularly for the

injury to his leg, and has been unable to earn anything, and will be so for some time to come.

"I shall be glad to know if you care about your medical man seeing him, and what you propose to do in the matter.

(Signed) "W. H. Matthews."

The judge held "that no sufficient notice had been served on the defendant in accordance with s. 7 of the Act, and that the omission of all reference to the cause of action was not such a defect or inaccuracy as would come within the meaning of the last clause in that section." He further held, "that, in his opinion, if this omission could be regarded as a mere defect or inaccuracy, it was such as would prejudice the defendant in his defence: and it must have been made for the purpose of misleading." He therefore nonsuited the plaintiff.

A rule having been granted calling upon the defendant to shew cause why there should not be a new trial, on the ground that sufficient notice of injury under the Employers' Liability Act had been given,

Atherley Jones shewed cause. Sect. 4 of the Act provides that an action for the recovery of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks and the action is commenced within six months from the occurrence of the accident causing the injury, &c.: and s. 7 enacts that notice in respect of an injury under this Act shall give "the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained," and shall be served upon the employer, &c.; and at the end of the section is this proviso,—"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading." The notice here was defective in the second particular; it does not state the cause

1882

STONE v. HYDE.

of the injury, and therefore was no notice at all. The notice under this Act must be in writing: *Moyle* v. *Jenkins*. (1)

[CAVE, J. Unless you can say that this was no notice at all, any defect in it is cured by the proviso at the end of s. 7.]

A document which omits to convey the most essential information clearly cannot be considered as a notice in compliance with the Act. Besides, the judge finds that, if the omission could be regarded as a mere defect or inaccuracy, it was one which in his opinion would prejudice the defendant in his defence, and that it was for the purpose of misleading.

[MATHEW, J. The question is whether he was justified in coming to that conclusion.]

The main object of the requirements of the 7th section is, to protect employers against unfounded claims.

R. G. Glenn, contrà, was not called upon.

MATHEW, J. I think this nonsuit must be set aside. The notice which professes to be given under the Act gives the date at which the accident happened, and states that the plaintiff is under medical treatment at Guy's Hospital as out-patient, "particularly for the injury to his leg." The point urged was, that, inasmuch as the notice did not particularly describe the cause of the injury, it was not a mere defective notice, but was no notice at all. Now, when we consider that the object of the legislature in passing this Act was to confer a benefit upon the working classes, I think it would be unreasonable and unjust, and contrary to the spirit and intention of the Act, to require these notices to be framed with all the particularity of a statement of claim. It is urged that, assuming this to be a defective notice, the judge has found that the omission was one which was calculated to prejudice the defendant in his defence, and that the defect was for the purpose of misleading. What evidence was there of that? The judge appears to have come to the conclusion he states without anything to warrant it. He ought to have set out the facts upon which his conclusion was based. I think the notice was a defective one only, and that the plaintiff should not have been nonsuited.

(1) 51 L. J. (Q.B.) 112. 8 Q.B.D. 116

1882

STONE v. HYDE.

CAVE, J. I am of the same opinion. The 7th section requires the notice to give the name and address of the person injured, and to state in ordinary language the cause of the injury and the date at which it was sustained. It seems to me that when one of the things which the section requires to be stated is omitted the notice is a defective notice. The notice is supposed to be given by a person in a humble sphere of life, and not possessed of much knowledge. It is to be written in "ordinary language," that is, the party is to use his own untutored language. If it is to be construed with rigorous strictness, the Act will be made nugatory. By the proviso at the end of s. 7, the notice is not to be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading. I entirely agree with my Brother Mathew that the county court judge has failed to apply his mind to that question. He seems to have come to the conclusion without any inquiry that a notice in this form must prejudice the defendant in his defence to the action, and could have had no other object than that of misleading. Why he came to that conclusion I am at a loss to conceive. He states no facts and gives us no information which justifies him in coming to either of these conclusions. He seems to have thought they followed from the mere fact of the notice being defective in the particular I have mentioned.

Rule absolute.

Leave to appeal refused.

Solicitor for plaintiff: *E. A. Swan.*
Solicitor for defendant: *E. Kimber.*

J. S.

1882
May 1.

IVAY *v.* HEDGES.

Negligence—Landlord and Tenant—Licensee—Obligation to Fence—Private Way.

11QBD477.8 The defendant was the landlord of a house which was let out in apartments to several tenants each of whom had the privilege of using the roof (which was flat and covered with lead, having an iron rail on its outer edge,) for the purpose of drying their linen; the access to the roof being by means of a low door at the stair-head about two feet from the rail. The plaintiff, the occupier of one of the rooms, went upon the roof for the purpose of removing some linen, when, his foot slipping, and the rail being out of repair (and known by the landlord to be so), he fell through to the court-yard below, and was injured:—

Held, that the mere licence to the lodgers to use the roof as a drying-ground imposed no duty upon the defendant to fence it or to keep the fence in repair.

ACTION in the Whitechapel county court.

At the trial it appeared that the defendant was the landlord of a house in Red Lion Street, Wapping, which he let out to several tenants, each of whom had the privilege of using the roof (which was flat and covered with lead, having a wooden rail on the outer edge,) for the purpose of drying their linen; the access to the roof being by means of a low door at the stair-head about two feet from the rail. The plaintiff, a tenant of one of the rooms, went upon the roof for the purpose of removing some linen, when his foot slipped, and, the rail being out of repair (and known by the landlord to be so), he fell through to the court-yard below and was injured.

The plaintiff was nonsuited, the judge holding that there was no duty on the landlord to protect such a place, and that, if the lodgers chose to use the roof for the purpose stated, they must take it cum onere.

T. W. R. Davids, moved for a new trial on the ground that there was evidence of negligence on the part of the landlord which was fit for the consideration of a jury. The privilege of drying his linen on the roof would naturally be an inducement to a tenant to hire the room, and he was entitled to have it kept

in a condition of reasonable safety. In *Indermaur* v. *Dames* (1), the plaintiff, a workman who came upon the defendant's premises by the defendant's licence to do work there, was held to be entitled to recover damages for an injury sustained by him by falling through an unfenced opening used for business purposes in the floor of a warehouse. In a Scotch case of *M'Martin* v. *Hannay* (2), a child was killed by falling through the railing of a common stair where one of the banisters was wanting; and it was held by the sheriff-depute and afterwards by the sheriff, that the proprietor of the property was liable in damages to the father of the child, inasmuch as warning of the state of the stair had been given to the factor appointed by him to look after the property. On appeal to the Court of Session, Lord Cowan said: "The defender is proprietor of a tenement of houses occupied by twelve different families, all of whom have access by one common stair from the several landings on which the separate houses of the tenants enter. The accident arose from defect in the railing of this outside stair. This railing it was the landlord's duty to keep in repair, and he cannot escape responsibility for the consequences of its being left in a dangerous condition." And Lord Benholme said: "Whenever property is left unfenced and in such a state as to be dangerous to the public entitled to be there, the proprietor, or some one in his stead, must be answerable for the damage or injury which may thereby be occasioned." By parity of reasoning, the defendant ought to be held liable here. [He also cited *Tarry* v. *Ashton*. (3)]

LORD COLERIDGE, C.J. I am of opinion that the county court judge was right. I am quite unable to see any liability in the defendant under the circumstances existing here. If there had been an absolute contract for the user of this place in a particular way, it might be that the defendant would have been liable for not keeping it in a safe condition. But, if the contract was, as we must take it to have been,—I let you certain rooms, and, if you like to dry your linen on the leads, you may do so,—in that case

(1) Law Rep. 1 C. P. 284; ibid. 2 C. P. 311.

(2) 10 Court of Sess. Cas. 3rd Series, p. 411.

(3) 1 Q. B. D. 314.

1882

IVAY v. HEDGES.

the tenant takes the premises as he finds them. No case has been cited in the English Courts which has the least bearing on the matter. The Scotch case, *M'Martin* v. *Hannay* (1), which, though not binding as an authority, is nevertheless entitled to the greatest respect, though it bears some resemblance in its circumstances to this case, is not in point. The tenement was let out in flats, all the tenants using a common staircase. The staircase therefore was a necessary part of the holding, and it was the landlord's duty to keep it in a state in which it could be safely used. It was an implied condition in the bargain that the mode of access to the several flats should be safe. There is no such implied condition here. *Tarry* v. *Ashton* (2) was the case of a man who for his own convenience fixed in front of his shop a lamp which projected over the footway along which the public had a right to walk. Having chosen to hang his lamp there, it was his duty to keep it safely so that by its falling a person lawfully passing should not be hurt. That is a totally different case from this. There will be no rule.

GROVE, J. I am of the same opinion. There was clearly no duty cast by law upon the landlord under the circumstances of this case to fence his roof in the way suggested. There would be no end of these cases if we were to hold that there was evidence fit to be left to a jury.

Rule refused.

Solicitor for plaintiff: *John May Curtis.*

(1) 10 Court of Sess. Cas. 3rd Series, p. 411. (2) 1 Q. B. D. 314.

J. S.

FLOWER AND OTHERS *v.* SADLER.

1882
Jan. 21.

Bill of Exchange—Illegality of Consideration—Compounding Felony.

In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to shew that the creditor was thereby induced to abstain from prosecuting.

Ward v. *Lloyd* (7 Scott, N. R. 499) followed.

10 QBD 57

ACTION by the plaintiffs as the indorsees of three bills of exchange accepted by the defendant.

At the trial before Denman, J., the case was reserved for further consideration.

Jan. 21. *Finlay, Q.C.*, for the plaintiffs.

Askwith and *Fullarton*, for the defendant.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

DENMAN, J. This was an action on three bills of exchange for 100*l.* each, at three months, drawn by one Maynard upon the defendant on the 24th of February, 1880, and accepted by the defendant, and indorsed by Maynard to the plaintiffs.

The case came on for trial before me in Middlesex, when the jury were discharged by consent, and it was agreed that I should try the case without a jury.

The facts I find to have been as follows: Maynard, the drawer of the bills, had since January, 1879, been employed by one Gould, who managed certain estates at Battersea belonging to the plaintiffs bringing in some 18,000*l.* a year, to collect the rents. Early in February, 1880, Gould found that Maynard had not paid over all the rents he had collected; whereupon he spoke to Maynard about it, who acknowledged that a sum of about 420*l.* was due from him, and, on being asked what he had done with the money, he said that he had invested it in the purchase of a share in a gas-regulating patent, and offered to transfer his interest to the plaintiffs. This was declined, and Gould insisted

1882

FLOWER v. SADLER.

upon his selling his interest. A day or two afterwards Maynard told Gould that he had sold half his share to the defendant for 900*l.*, but that the defendant was not prepared with cash, but would give his acceptances, and asked Gould if he would take the acceptances of the defendant as a collateral security for the amount due to the plaintiffs for the rents not paid over. Gould referred to Mr. W. Flower, who was one of the plaintiffs, and acted as their solicitor, who, after inquiries of the defendant's solicitors, advised that it might be done. On the 9th of March, Gould, W. Flower, and Maynard met, and Maynard gave to Gould a memorandum stating "that he had deposited with Gould on behalf of the plaintiffs certain bills (including the three in question), out of the proceeds of which bills Gould was to retain the sum of 420*l.* admitted by Maynard to be due to the plaintiffs on the balance of account of rents received, with interest at 5 per cent." At the same time, Maynard gave Gould a letter also dated the 9th of March, referring to the memorandum, and adding, "It is agreed that, said bills having been given as consideration for a fourth share interest in the business of the patent gas regulator, one other fourth share whereof is still vested in myself, all surplus funds arising from Mr. Sadler's and my own shares in such business shall as realized in anticipation of maturity of such bills be handed over to you towards payment of the same; and I undertake to see that such amounts shall be so applied." A further document was also handed to Gould by Maynard on the same occasion, viz. an undertaking of even date with the bills, by which Sadler undertook to hand to Maynard a policy on his own life for 1000*l.*, then in the hands of Sadler's solicitor, within a fortnight, which he said he had received from Sadler as a further security for the payment of the bills.

The defendant pleaded in his defence several matters upon which issue was taken, but none of which were, I think, proved, except what I am about to state; and the only question about which I have entertained any doubt is whether, upon these facts, coupled with those I have already stated, the defendant has a right to judgment, on the ground that the indorsement of the bills to the plaintiffs was obtained from Maynard by a threat of prosecution, or by an agreement for the compounding of a felony; the

plaintiffs contending,—first, that the indorsements of the bills were not in fact obtained by any such threat or agreement,—secondly, that, if they were, the defendant, the acceptor, has no right to take advantage of that fact as a defence as against the plaintiffs, the indorsees.

There was some confusion as to the time at which certain conversations took place: but I think it was made out pretty clearly that the acceptances sued upon were given by the defendant to Maynard on the 24th of February, the day the bills bear date. On the 27th Gould and Maynard discussed with Mr. W. Flower Maynard's proposal to leave some of Sadler's bills with Gould, and to get others discounted if possible; and it was then arranged that he should if possible *pay the money*, i.e. the 420*l.*, on the following Tuesday (2nd of March). Between the 27th of February and the 9th of March Mr. W. Flower made inquiries as to Sadler's sufficiency and as to the value of the policy referred to in the letter of the 24th of February, and was apparently satisfied before the 9th of March that the security offered was sufficient. During the time when Gould was cognizant of Maynard's defalcations, and before Mr. W. Flower was communicated with on the subject, and before the bills were taken, Gould said to Maynard that, "unless the deficiency admitted by him were paid or some security given for it he might be prosecuted:" and on the second occasion on which Gould, Maynard, and W. Flower discussed the question of whether the bills should be taken, Mr. W. Flower said to Maynard that he had better get the money, or he would be prosecuted,—meaning that, if he did not raise the money by discounting these bills, he would be prosecuted for embezzlement.

Mr. Flower in his evidence stated the facts as follows, and I have no doubt truly, viz. that he wished to put all the pressure he could upon Maynard to pay, and used the language with that view; but added, "He," Maynard, "had always been ready to secure the money with these bills, and did afterwards secure it to our satisfaction on the 9th of March; and I thereupon abandoned all idea of prosecuting him, and did not think any more of the matter, because I had got the bills. What I said about prosecution was, to induce him to get the money, and not the bills. He had already offered the bills."

1882

FLOWER v. SADLER.

It was arranged at the trial that I should take an affidavit of the defendant made in answer to interrogatories as evidence upon the argument. I have done so; but I believe the facts to be as stated above, and that the bills, as between the defendant and Maynard, were given in payment of a share in the patent, and not only that the proceeds should be so applied only in case of discount being obtained by Maynard.

I entertained some doubt after hearing the evidence, as to whether the plaintiffs were entitled to recover, and heard a very able argument by Mr. Askwith for the defendant and Mr. Finlay for the plaintiffs. But, after hearing that argument, during which several cases were cited, I happened to find the case of *Ward* v. *Lloyd* (1), which seemed to me to make it desirable that at the request of either side I should hear further argument; and I did so at the plaintiffs' counsel's request. That case does not appear to me to be in conflict with any other of the numerous cases which were cited before me, and to be very much in point. It was an application to set aside a judgment signed upon a warrant of attorney; and the judgment of the Court is entirely confined to the question whether the transaction ought to be set aside on the ground that it was the result of an illegal agreement to compound a felony. There, as here, there was a receipt of money by a collector and a failure to account, and language stronger than is to be found in the present case in the direction of a threatening to prosecute. But Tindal, C.J., Coltman, Erskine, and Maule, JJ., in the most forcible terms laid it down that, where there is a debt actually due, the mere use of language of this kind, though followed by an abstaining to prosecute, will not vitiate the transaction. Tindal, C.J., uses the following language in giving his judgment: "It must be borne in mind that this is not the case of security *given* by way of bribe or inducement for an interested party to withhold a charge of a criminal nature; but there is a just debt due from the defendant to the plaintiff. It may be that the plaintiff held out threats of prosecution in order to induce the defendant to give the security for the debt: but it is not enough to shew that the plaintiff even came to a determination to abstain from proceedings and to treat the defendant as his debtor; and

(1) 7 Scott, N. R. 499.

there is the positive denial of the plaintiff that he made any such agreement as that suggested." Coltman, J., decides on the same ground in language equally clear. And Erskine, J., said: "Circumstances ought to be shewn leading to the irresistible inference that such a compact was in fact made." Yet in that case there was evidence that, when the plaintiff first discovered the defalcations, he threatened to prosecute the defendant for unlawfully making use of his money, unless he would go to see the plaintiff's attorneys and give satisfactory security, and the defendant afterwards went to the plaintiffs' attorney and gave the security in question, and no prosecution followed. I think that the case of *Ward* v. *Lloyd* (1) shews that the question in the present case is really one of fact.

The other cases cited before me were, I think, all successfully distinguished by Mr. Finlay. The cases of *Williams* v. *Bailey* (2) and *Seear* v. *Cohen* (3) were cases in which there was no liability of any kind on the part of the persons who assumed a liability to the plaintiff under the influence of the threat; so that the transaction relied upon as a defence could be attributed to nothing else but illegal conduct on the part of the plaintiff: see per Lord Westbury at p. 219 of the report of *Williams* v. *Bailey*. (2)

After full consideration of all the cases cited on both arguments, and of the evidence, I have come to the conclusion that the defendant has not established that the bills were given or indorsed upon any agreement to stifle a prosecution, or by reason of a threat of prosecution. The bills were given by Sadler to Maynard as payment for his share of the patent. They were indorsed to the plaintiffs in consideration of a sum which Maynard undoubtedly owed them, and for the default in paying which it is by no means clear that any prosecution for embezzlement was ever seriously contemplated. There is, so far as I can see, no ground for thinking that Maynard obtained the bills from Sadler under the influence of the language used, or that the words used either by Gould or Flower were used in order to obtain the kind of security which was ultimately accepted by the plaintiffs, or that it operated in any way to induce Maynard to indorse the bills to the plaintiffs,

(1) 7 Scott, N. R. 499. (2) Law Rep. 1 H. L. 200.
(3) 45 L. T. 589.

1882

FLOWER v. SADLER.

so as to shew that their title to sue had been in any way created or brought about by the language relied upon. I think that the transaction of the 9th of March, when the bills were indorsed by Maynard and handed to the plaintiffs, cannot be fairly considered to have been otherwise than a free and bonâ fide transaction whereby the plaintiffs, being unable to obtain cash from Maynard, took the defendant's bills as the best mode of securing their loss by reason of Maynard's defalcations, the acceptances themselves having been in no way procured by anything Gould or Flower had said; but a genuine business transaction between Sadler and Maynard, viz. the sale by the latter to the former of his share in the patent; and the indorsement to the plaintiffs having been equally voluntary.

This being my opinion upon the question of fact raised in the defence, whether it be put as an illegal agreement or as the case of indorsements obtained by threats, it becomes unnecessary to consider the second point, viz. whether the defence would be available to the acceptor in this case, even if the indorsement had been given upon an illegal agreement or in order to avoid prosecution after a threat by the plaintiffs.

I therefore give judgment for the plaintiffs for the amount of the bills and interest (320*l.*), with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *W. & J. Flower & Nussey.*
Solicitor for defendant: *C. Harcourt.*

J. S.

MORTON *v.* PALMER. 1882

Practice—Costs of Interlocutory Proceeding—Order for Payment—Default of Payment—Staying Proceedings. Feb. 23.

The plaintiff obtained a verdict in an action, and the Queen's Bench Division having refused to grant a rule nisi for a new trial, the defendant obtained a rule absolute in the Court of Appeal. By the rule the plaintiff was ordered to pay the costs of the applications, which he failed to do:—

Held by Mathew and Cave, JJ., that the defendant was not entitled to an order to stay the proceedings until the costs were paid.

MOTION by way of appeal against an order staying the action until the plaintiff should pay certain costs.

The action was tried and resulted in a verdict for the plaintiff. The Divisional Court refused to grant a rule nisi for a new trial on the application of the defendant, but the Court of Appeal granted a rule nisi to enter judgment for the defendant or for a new trial, and the rule was afterwards made absolute in these terms, "It is ordered that the verdict found for the plaintiff on the trial of this cause and the judgment, if any, entered or signed thereon be set aside, and a new trial had between the parties, the costs of the first trial to abide the event. And it is further ordered that the plaintiff do pay to the defendant or his solicitor the costs of this appeal and of the application to the Divisional Court, to be taxed by the master." The costs of the motions were taxed, but were not paid by the plaintiff, whereupon the defendant applied to a master for a stay of proceedings till the costs should be paid, and the master made the order which was confirmed by a judge at chambers.

Feb. 20. *Finlay, Q.C.*, for the plaintiff. The plaintiff cannot be prevented from proceeding with his case merely because he is in default in paying the costs he was ordered to pay. There is nothing in the order of the Court of Appeal which makes it a stay, neither does the practice. An order to stay was made in *Cook* v. *Hathway* (1), but there the assignee of a bankrupt desired to proceed without paying costs, which the bankrupt had been

(1) Law Rep. 8 Eq. 612.

1882

MORTON v. PALMER.

ordered to pay. That is no authority for the present application, because that was a case of a new party to the suit desiring to take the benefits without the liabilities. The principle that the person who does not comply with an order as to costs is in contempt cannot apply since the Debtor's Act, 1869. (1) The only other authorities are cases in which the party in default has leave to proceed on payment of costs, and they do not apply here where no such order has been made.

W. G. Harrison, Q.C., and *M'Call*, for the defendant. The Chancery practice is that where a litigant does not pay costs which he is ordered to pay he is in contempt and on a proper application all proceedings will be stayed: *Wilson* v. *Bates* (2); *White* v. *Bromige*. (3) The same practice must be taken to prevail now in all the courts: *Grant* v. *Holland*. (4) The Court of Appeal did not make an order to stay in this case for the reasons given in *Goddard* v. *Thompson* (5); but they made the order knowing what the practice is, and the application for a stay on that order is rightly made. The rule is laid down in Daniell's Chancery Practice, 5th ed., p. 697, and the forms are given in Daniell's Chancery Forms, 3rd ed., p. 957. The question of the abolition of imprisonment for non-payment of costs does not touch the right of the Court to punish contempt otherwise. If this order is not a matter of right it is one on which the judge at chambers has exercised a discretion with which the Court will not interfere.

Finlay, Q.C., in reply.

Cur. adv. vult.

Feb. 23. The following judgments were delivered:—

MATHEW, J. This was a motion for a stay of proceedings in the action until payment by the plaintiff of the costs of certain interlocutory proceedings, which he was ordered by the Court of Appeal to pay. A master had made an order for a stay of proceedings, and that order was approved by the judge on appeal. The order was made for two reasons,—first, that the Court will

(1) See *Jackson* v. *Mawby*, 1 Ch. D. 86.

(2) 3 My. & Cr. 197.

(3) 26 W. R. 312.

(4) 3 C. P. D. 180.

(5) 47 L. J. (Q.B.) 382.

always interfere to prevent an oppressive use being made of its process,—secondly, that, according to the practice of Courts of equity, the Court ought to stay the proceedings until the order of the Court of Appeal has been complied with. It seems to me to be very questionable whether the order could be made upon either of these grounds. But there is a question to be considered here, viz., whether the Court of Appeal could have contemplated such a condition when they made the order. There is no such condition imposed in terms by the order, and I think that it was made with reference to the procedure of the Common Law Courts. I think the master had no right to interpolate a condition which the judges of the Court of Appeal did not impose. The appeal must be allowed, with costs.

CAVE, J. In this case the Court of Appeal has ordered the plaintiff to pay the costs of certain interlocutory proceedings in that Court; and the question before us is, whether further proceedings in the action by the plaintiff should be stayed until these costs are paid.

It was first contended that the defendant is entitled to such stay as a matter of right, and that we have no discretion to refuse it. I cannot accede to this argument. It is to my mind entirely contrary to justice that, without being at liberty to exercise any discretion whatever in the matter, the Courts should be compelled to say that a man who may have a just claim should be prevented from pursuing it further because he may be unable to pay the costs of some interlocutory proceeding in which he may have failed perhaps from no fault of his own. Mr. Harrison says that this right has been recognised and acted upon in the Court of Chancery. But, on looking at the cases he has referred to, I cannot find that any such rule has ever been laid down or even suggested.

It was next contended that, in the exercise of our discretion, we ought to stay proceedings until these costs have been paid. Now, the order of the Court of Appeal simply directs that the plaintiff shall pay these costs: it does not stay further proceedings until these costs are paid; nor does it direct that they shall be defendant's costs in the cause in any event. It simply directs that the

1882

MORTON v. PALMER.

plaintiff shall pay them, which of course means that he shall pay them forthwith after taxation. The costs have been taxed, and have not been paid. Ought we, then, to stay further proceedings until they are paid? Before the passing of the Judicature Acts, in the Court of Chancery it appears to have been the practice, where a motion had been refused with costs, not to allow the motion to be renewed until those costs had been paid: *Bellchamber* v. *Giani* (1); *Oldfield* v. *Cobbett.* (2) So, in the Common Law Courts, it has been the practice, where a second action has been brought, for the Court to stay proceedings until the costs of the former action were paid, provided both actions were by and against the same parties and for the same cause or substantially so: see *Hoare* v. *Dickson* (3), where most of the previous cases on the subject are referred to, and *Cobbett* v. *Warner.* (4) The principle of the practice in each Court was the same, viz., that, if a litigant had brought an action or made a motion against another and had failed, he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding. This practice, however, is no justification for our making such an order in this case. The plaintiff here is not seeking to try over again something in which he has failed before. He succeeded in the former trial, and that verdict having been set aside for misdirection, on the terms that the costs of the first trial are to abide the event of the second, he is now desirous of taking his chance of a second trial. It is quite true that he was ordered to pay the costs of the appeal, and has not paid: but for those costs the defendant has the ordinary remedies; and I am of opinion that there is no rule of practice which could justify us in doing what the Court of Appeal has not done, and making his right to go to a second trial conditional on his paying those costs.

Order to stay set aside.

Solicitors for plaintiff: *Edward Doyle & Sons.*
Solicitors for defendant: *Indermaur & Co.*

(1) 3 Madd. 550.
(2) 12 Beav. 91.
(3) 7 C. B. 164.
(4) Law Rep. 2 Q. B. 108.

A. M.

THE QUEEN *v.* GANZ.

1882
March 30.

Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *ss.* 10, 15, 26—*Foreign Warrant of Arrest, Authentication of—Extradition of Subject of State not party to Extradition Treaty.*

An extradition treaty between the United Kingdom and the Netherlands provided that the governments, parties to the treaty, should reciprocally deliver up to each other any persons, who being accused of any of certain specified crimes committed within the jurisdiction of the party requiring the extradition should be found in the territories of the other party. The treaty further provided that neither of the contracting governments should be bound to deliver up its own subjects, and that a person arrested under the treaty in either country should be discharged, if within fourteen days a requisition should not have been made for his surrender by the diplomatic agent of "his" country :—

Held, that the provisions for the extradition of criminals under the treaty were not confined to persons who were subjects of the state requiring the extradition, but applied to all persons who had committed any of the specified crimes within the jurisdiction of such state of whatever nationality they might be, except subjects of the state from which extradition was required.

A document produced before a magistrate as the "foreign warrant" of arrest under s. 10 of the Extradition Act, 1870, was sealed with the seal of the department of justice at the Hague, and purported to be a copy of the record or minutes of a certain order or decree of the criminal court of justice there, setting forth the charges against the criminal whose extradition was sought, and authorizing proceedings against him and his arrest :—

Held, that the production of such a document before the magistrate was a sufficient compliance with the provisions of s. 10 of the Extradition Act, 1870, which provides that the magistrate may commit the criminal to prison, if, inter alia, the foreign warrant authorizing his arrest is duly authenticated.

Semble, such document must be regarded as in the nature of an original for this purpose.

APPLICATION for a writ of habeas corpus (1), to obtain the release of one Edward Nathan Ganz who had been arrested

(1) In point of fact a rule absolute in the first instance for a writ of habeas corpus had been previously granted, and the writ issued. The prisoner was brought up in custody on the return, but the Attorney-General at the commencement of the argument pointed out that the practice in matters of this sort had since 1873 been to obtain a rule nisi for a habeas corpus, and argue the case on the rule, and that such practice was far more convenient. He also stated that the points on which the prisoner's counsel wished to rely would not be available to him on the return to the writ which was on the face of it perfectly good. It was, therefore, agreed that the matter should be argued as if the prisoner's counsel were now moving for a rule nisi on affidavits, and the Crown shewing cause against such rule. It is reported accordingly.

1882

THE QUEEN v. GANZ.

under an extradition warrant granted by Sir James Ingham, a metropolitan police magistrate, and committed to prison with a view to his extradition in respect of a crime committed in the Netherlands.

The facts so far as material to the points here reported were as follows:—

The document produced before the magistrate as the foreign warrant authorizing the arrest of the prisoner in the Netherlands, and upon production of which the prisoner was committed to prison under s. 10 of the Extradition Act, 1870, was sealed with the seal of the department of justice at the Hague, and was as translated in the following terms:—

Copy.

Warrant of arrest, in the name of the king. The Court of Justice at the Hague in council assembled. Seen the report of the Arrondissement Court of Justice of Rotterdam assembled in council, of the 15th of November, 1881, in the case of Bernhardt Wyprecht (as he calls himself) from which report it appears that the papers in this case shewed no crime, the demanded prosecution was refused, and it is declared that there is no ground for further proceedings. Seen the act of protest dated the 16th of November following against the report submitted by the officers of justice of the mentioned court of justice. Seen the papers and requisition of the public prosecutor, shewing that he does not approve of the report of the Court, against which he protests, to do nothing, nevertheless demands institution of proceedings against Bernhardt Wyprecht in the mentioned case and warrant for his arrest. Seen the further papers. Considering that there exist sufficient reasons for complaint, the accused being said to reside in the course of 1881, at Rotterdam, to have advertised from there in different German newspapers, wherein he, stating that he traded as Bernhardt Wyprecht & Co., in Rotterdam, offered different wares, some of which he named at en gros prices, guaranteeing his buyers that they were picked out through his own factories, and could be delivered at such low prices that through buying from him many hundred marks per annum could be saved, all entirely fraudulent and without any intention of keeping to his offer. Furthermore, he is said to have induced

different persons by these advertisements to send him moneys as prepayment in ordering some of the advertised goods, and also from the persons mentioned beneath the amounts standing against their names without sending them the ordered goods, to have received the same and fraudulently become possessed of them to their damage, viz. [Then followed list of names and amounts.]

Taking into consideration that these acts are punishable by Article 405 of the penal code. Seen the Articles 88 and 89 of the Law Book of Demands for Punishment. That the beforementioned Report of the Court of Arrondissement will not be accepted. Authorized proceedings with order for arrest against Bernhardt Wyprecht (calling himself so), last living at Rotterdam whence absconded. Done at the Hague on the 21st of November, 1881, by the following gentlemen:—Mr. Spon, Vice-President; Councillors, Van Olden Barneveldt, Lette van Ostvoorne, Van Lilaar, and Van Genns, councillors of the Court who have signed this besides the actuary.

(Signed) J. Spon.
Councillor Van Olden Barneveldt.
S. Lette van Ostvoorne.
Van Lilaar.
J. J. van Genns.
Wyckerheld Bisdom.

For copy, delivered on demand of the O. M., the actuary of the Court of Justice at the Hague.

(Signed) Wyckerheld Bisdom, and M. Vanderbergh.

Seen for certifying the handwriting of the above-named Jh. M. A. J. Th. Vanderbergh, and M. C. J. J. Wyckerheld Bisdom. The Hague, December 2, 1881.

For the Minister of Justice, the Secretary-General.

(Signed) Clamm.

The Bernhardt Wyprecht referred to was proved to be the same person as the prisoner. It appeared that letters of naturalisation as a subject of the United States of America, dated in 1880, were found upon the prisoner, and produced before the magistrate, and the prisoner had also for the purposes of the present application made an affidavit that he was a naturalised subject of the

1882

THE QUEEN v. GANZ.

United States, and that he was not born in the Netherlands, but to the best of his belief in Hungary.

By the extradition treaty between this country and the Netherlands, it was provided, inter alia, in substance, as follows: By the first article of the treaty, it was provided that her Britannic Majesty and his Majesty, the King of the Netherlands, should, on requisition made in their name, by their respective diplomatic agents, deliver up to each other reciprocally, any persons who being accused or convicted of any of the crimes thereinafter specified, committed within the jurisdiction of the requiring party, should be found within the territories of the other party. The third article provided that no subject of the Netherlands should be delivered up to the government of the United Kingdom, and no subject of the United Kingdom should be delivered up by the government thereof to the government of the Netherlands. The article proceeded to define "subjects" for the purposes of the article, as including not only naturalised citizens of the country, but also such foreigners, as, according to the laws of either of the contracting parties, are assimilated to subjects, as well as such foreigners, who, being domiciled in the country, and having married a citizen thereof, have one or more children by that marriage born there.

The eleventh article provided that a fugitive criminal might be apprehended under a warrant issued by any police magistrate, justice of the peace, or other competent authority in either country, upon such information or complaint, and such evidence, or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant, if the crime had been committed, or the prisoner convicted in that part of the dominions of the two contracting parties, in which he exercises jurisdiction, provided, however, that in the United Kingdom the accused should in such case be sent as speedily as possible before a police magistrate in London, and that he should be discharged as well in the United Kingdom as in the Netherlands, if within fourteen days a requisition should not have been made for his surrender by the diplomatic agent of "his" country.

By the eighth article of the treaty it was provided to the following effect, viz., that the requisition for the extradition of the

accused person should be accompanied by a warrant of arrest issued by the competent authority of the state requiring extradition and by such evidence as, according to the law of the place where he is found, would justify his arrest if the crime had been committed there. (1)

Besley, and *Tickell*, for the prisoner. This prisoner being naturalised in the United States of America must be treated as being in the same position as a born subject of the United States. It is clear by implication from the treaty that it is only intended to apply to the extradition of fugitive criminals being the subjects of one of the contracting parties escaping to the dominions of the other. An English subject, it is expressly provided, is not to be surrendered to the Netherlands government, nor a Netherlands subject to the English government. It would appear, a fortiori, that the subject of a third government, no party to the treaty, is not to be surrendered. By the eleventh article the demand for extradition is to be by the diplomatic agent of "his (the criminal's) country." The diplomatic agent of the Netherlands is not the diplomatic agent of the prisoner's country, and it cannot be intended that the American minister should apply for the prisoner's surrender to the Dutch government.

[POLLOCK, B. Must not a man be taken primâ facie to be the subject of the country in which he commits the offence at the time of so committing it, and does it not lie on him to shew the contrary? Does it follow that because a man is a naturalised subject of the United States he may not for this purpose be a subject of the Netherlands?]

There is evidence that the prisoner was not born in the Netherlands. It is submitted that the prisoner in this case has sufficiently shewn that he was not a Netherlands subject, so as to repel the primâ facie presumption that he is and to shift the onus of proof.

2ndly. There was no sufficient foreign warrant of arrest produced within s. 10 of the Extradition Act, 1870, and the 8th article of the treaty. The document relied on is headed "copy."

(1) Only so much of the treaty and of the proceedings is referred to as is material to explain the points decided.

1882

THE QUEEN v. GANZ.

An original foreign warrant authorising the arrest of the prisoner must be produced: Clarke on Extradition, 178.

The Extradition Act, s. 10, requires the production of the foreign warrant authorising the arrest duly authenticated, and s. 15 provides for the mode of authentication. This document is not in the nature of a warrant of arrest. It is a mere copy of the minutes of proceedings in a Court by which the issue of an order of arrest would perhaps have been justified, but it is not in itself a warrant.

By the 15th section of the Extradition Act, 1870, "copies" of depositions are expressly made admissible, but there is no mention of copies of warrants. It is therefore contended that the original warrant must be produced properly authenticated as required by the 15th section. This document is insufficient, first, because it is not a warrant at all; secondly, because it is not an original. The general effect of the Act is to enable a foreign warrant of arrest to be put in force in England; but this is not such a warrant, but is merely in the nature of a certified copy of the proceedings of the Court at the Hague.

By the eighth article of the treaty the requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the state requiring the extradition. It is clear that this means the original warrant.

Sir H. James, A.G., and *A. L. Smith*, shewed cause. With regard to the first point, it is clear that any person in a country is amenable to the criminal laws of that country whether native born or a stranger: Wheaton on International Law, ss. 84, 113. The first article of the treaty is couched in terms large enough to include all persons committing a crime within either of the countries. The third article only restricts the generality of the words of the first by excepting subjects of the country from which extradition is sought. Assuming that this man was a native subject of the United States, there is nothing whatever in the words of the treaty to prevent his extradition to the Netherlands. If it were otherwise, a criminal committing a crime in any country of which he was not a subject, and escaping to another country, must escape punishment altogether. But it is not

admitted that the prisoner is to be treated as a born subject of the United States. By virtue of such letters of naturalisation a person born in another country obtains, no doubt, while resident in the United States, certain rights and privileges, but if he goes back to the country of his birth he is not thereby freed from his allegiance. Primâ facie this man being in the Netherlands must be treated as a born subject of the Netherlands. There is no sufficient evidence that he was not such, and, if so, the fact that he was naturalised in the United States is immaterial.

With regard to the second point, viz., as to the production of a proper warrant of arrest, admitting, for the moment, that this is not an original warrant of arrest, the non-fulfilment of the obligation of the treaty, whatever it may be, in that respect, has nothing to do with the jurisdiction of the magistrate, which depends on the statute: *In re Counhaye.* (1)

It is contended that the document produced is a foreign warrant of arrest sufficiently authenticated both for the purposes of the treaty and of s. 10. The term "warrant" as applied in this section and treaty cannot have the technical meaning which it has in English law. The framers of the section could not have meant "warrant" in the sense of a technical form on parchment carried with him by a constable or other officer according to our domestic mode of procedure authorising him to arrest a person; such documents may not be in use in the particular foreign country. The 26th section defines "warrant" in the case of a foreign state as including any judicial document which authorises the arrest of the criminal. The question, therefore, is, what kind of document would be included in that description. Take this case for instance. This document purports to be the order of a Court, and the order would probably be entered in some book as a record of the Court. It could not be intended that in such a case the book should itself be produced. It is contended that this document is clearly within ss. 10 and 26 a foreign warrant of arrest. It ends with the order for the arrest, and is obviously the only document that is issued from the foreign Court for the purpose of the arrest. For the purposes of this proceeding it is an original, not a copy.

(1) Law Rep. 8 Q. B. 410.

1882

THE QUEEN v. GANZ.

Then it is duly authenticated in pursuance of s. 15, for it purports to be sealed with the seal of the department of justice.

Besley, in reply.

POLLOCK, B. I think that this application must be refused. Two points are made on behalf of the prisoner which are of importance as involving matter of principle affecting the liberty of the subject. The first of them is this: it is said that the prisoner is not subject to the extradition law as existing between this country and the Netherlands, by reason of his not being a subject of the Netherlands. It is said that the evidence before the magistrate shewed him to be a naturalised subject of the United States, and this evidence was also supplemented by an affidavit stating that not only has the prisoner been naturalised in the United States, but that also there is no reason to believe that he was born in the Netherlands—on the contrary, it says that he has reason to believe that he was born in a city in Hungary. Therefore it is contended that the extradition treaty between this country and the Netherlands does not apply, and that the prisoner cannot be given up to the government of the Netherlands. This matter, no doubt, depends not only on the English statute but also on the terms of the treaty; but before alluding to the treaty I would say that the leading principle which underlies all questions of nationality as applied to crime committed within any particular country is this. Whatever rights, civil or otherwise, a man may have which may be affected by his domicile, it is and must be perfectly clear by the law of all nations that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilised method. That has been the law from very far back, it is recognised by the earliest writers upon law, it has been adopted again and again in treaties and dealings between this country and other countries, and is to be found stated in all the text-books on the subject, and in all the cases in which the matter has been discussed. With reference to this general rule we must consider the provisions of the treaty to which our attention has been called. The Attorney-General has pointed out to us the very

general language of the first and third articles of the treaty. The first article runs thus. It is agreed that her Britannic Majesty and his Majesty the King of the Netherlands shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons who, being accused or convicted of any of the crimes thereinafter specified committed within the jurisdiction of the requiring party, shall be found within the territories of the other party. Here it is according to all ordinary rules that one would expect to find any limitation with respect to the character or status of the persons who are to be given up. Not only are the most general words used, viz. "any persons," but the article goes on and refers to their being persons accused or convicted of crime committed within the jurisdiction of the requiring party, clearly shewing that the definition of the person to be delivered up is any person who commits one of the specified crimes within such jurisdiction. Then when we come to the third article of the treaty there is an express definition of what is meant by the word "subject." It is to include not only naturalised citizens of the country, but also such foreigners as according to the laws of either of the contracting parties are assimilated to subjects as well as such foreigners who, being domiciled in the country and having married a citizen thereof, have one or more children by that marriage born there. The first part tends to shew that the person who is assimilated to a subject must be so in respect to the subject-matter with which the treaty is dealing, viz. the criminal law. It is clear that a person who commits a crime within a particular territory, for all purposes connected with that crime, is regarded as assimilated to a subject. The only other article to which I need refer is the eleventh article. That article was very much relied on by the counsel for the prisoner, but only one expression in that article seems to me to give any assistance to his argument. The article provides that the prisoner shall be discharged as well in the United Kingdom as in the Netherlands, if within fourteen days a requisition shall not have been made for his surrender by the diplomatic agent of "his" country. I do not, however, think that it is any very great stretching of the word "his" to say that "his country" means the country within whose jurisdiction he was for the purposes of

1882

THE QUEEN v. GANZ.

Pollock, B.

the criminal law administered there, and also "his" for the purposes of the treaty. I confess I do not myself feel at all pressed by this first point, nor should I have thought it necessary to call on the Attorney-General for any answer to it, except on the ground that this is no doubt a matter of general importance, and that it is desirable both in the interests of this and other countries that it should be thoroughly understood.

The second is a more technical, but still an important, point, and that depends to my mind not upon the treaty but on the construction of the domestic statute under which we are acting, and by which all our proceedings in England must be governed. The objection raised was this, and at first sight it seemed of some weight. It was urged that there was no proper warrant of arrest produced before the magistrate, who was called upon to detain and imprison the prisoner in order that he might be surrendered. This is an essential matter according to all the principles of justice. A person arrested in a foreign country is entitled to know in respect of what crime or offence he is so arrested. Accordingly a most careful provision is made in the statute for the protection of persons so sought to be arrested. I cannot help thinking, as I said during the argument, that there has sometimes been a little confusion of thought on the subject. It is not intended by the statute to give effect or currency to any foreign warrant within this country. The intention is to provide machinery whereby, if it can be shewn by sufficient evidence to the proper tribunal in this country that a person who has committed an offence in another country has come over here to escape the ends of justice, such person may be committed until there is an opportunity of surrendering him to the proper authorities of his own country. Looking at the statute in that light, the question is what precautions are taken by the legislature in the way of preliminaries to the jurisdiction of the magistrate. In many cases arising in this country, where our own procedure only is concerned, questions arise how far some irregularity in a warrant, whereby a man is arrested and brought before a magistrate, is fatal to the jurisdiction of the magistrate to hear and determine the case, the man being before him. Fortunately it is not necessary, I think, to consider any similar question with regard to the present case, for

1882

THE QUEEN v. GANZ.

Pollock, B.

it appears to me that the proceedings here were all regular. The question seems altogether to depend upon the meaning of the word "warrant," as used in the 10th section of the Extradition Act of 1870. That section says, "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced," and then the section goes on to specify what evidence is necessary, "the police magistrate shall commit him to prison, but otherwise shall order him to be discharged." Now what is the meaning of the term "foreign warrant?" By the interpretation clause, s. 26, "the term 'warrant' in the case of any foreign state includes any judicial document authorizing the arrest of a person accused or convicted of crime." Therefore, it is upon the production, not of a warrant of a foreign state, according to the technical meaning of the term "warrant" in English law, but upon the production of any judicial document authorizing the arrest of a person accused of a crime, that the magistrate may commit. We have before us the document in question. It appears to be a copy of an order of a foreign court. It begins by reciting certain proceedings which took place in an inferior court, and after various other recitals dealing with the matter very minutely, even setting out the names of all the persons alleged to have been defrauded by the prisoner, and the amounts of which they were alleged to have been defrauded, it says this: "Taking into consideration that these acts are punishable by Article 405 of the penal code, and having seen Articles 88 and 89 of the Law Book of Demands for Punishment, that the before mentioned report of the Court of Arrondissement at Rotterdam will not be accepted. Authorized proceedings with order for arrest against Bernhardt Wyprecht (calling himself so), last living at Rotterdam, thence absconded." Then come the signatures. The first is that of the vice-president of the court; then come those of others described as councillors of the court who have signed this besides the actuary. It seems to me impossible to say that this is not a judicial document authorizing the arrest of this person. Then comes the further question, the original order being in existence at the Hague, what evidence have we of it here in England? The evidence that we have is this. We have a copy

1882

THE QUEEN v. GANZ.

Pollock, B.

of it which is thus endorsed: "Delivered on demand of the O. M. the actuary of the court of justice at the Hague." The document is signed by the secretary general as representing the minister of justice at the Hague, and it bears the seal of the department of justice. Is that copy order so identified and so attested a document which can be received under this statute? That question appears to depend on the 15th section of the Act. It would be common knowledge in dealing with a matter of this kind that it would not be possible to produce before the police magistrate in London the originals of the judgments or orders of foreign courts or other similar foreign documents, and it was to be expected that some provision would be made for the production of copies, and accordingly the 15th section of the Act makes these provisions. "Foreign warrants, and depositions or statements on oath," "foreign warrants" by the interpretation clause, including foreign judicial documents authorizing the arrest of a person accused, "and copies thereof shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner for the time being provided by law or authenticated as follows:" "if the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;" and further on, "if in every case the warrants, depositions, statements, copies, certificates, and judicial documents, as the case may be, are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of state, and all courts of justice, justices, and magistrates, shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof." This particular document is sealed with the seal of the minister of state for the particular department, viz., the department of justice. It appears to me, therefore, that in this case the provisions of the statute have been complied with, and this application must be refused.

MANISTY, J. I am of the same opinion. With regard to the objection that the eighth article of the treaty has not been complied with, it is material to consider the provisions of the legislation on this subject. It is rendered necessary by the Act before a fugitive

1882

THE QUEEN v. GANZ.

Manisty, J.

criminal can be extradited that there should be a requisition by the diplomatic agent of the government demanding the extradition, and an order from the Secretary of State signifying to the magistrate that such a requisition has been made. It is very material, however, to observe that the warrant for the apprehension of the criminal may be issued by the magistrate before any requisition is made and before any instructions to the magistrate are issued by the Secretary of State, although in such case, if no order is received from the Secretary of State within a reasonable time to be fixed by the magistrate, the prisoner must be discharged. It appears to have been held in the case of *In re Counhaye* (1) that the jurisdiction of the magistrate to order the committal of the prisoner must depend on the terms of the Act of Parliament, and that the question whether the preliminary forms required by the treaty have been complied with may be waived by the Secretary of State. Blackburn, J., in giving judgment in the case, says, "As to the objection that the terms of the treaty have not been complied with the Secretary of State might have refused to order the magistrate to proceed; but these conditions are not in the Act of Parliament, and the Secretary of State having made an order, and the magistrate having acted under it, all we have to do is to look at the Act to see whether he had jurisdiction under it."

The substance of the treaty and of the Act of Parliament are in unison. In order to give the magistrate jurisdiction there must be a crime charged which is within the treaty, and the magistrate must have before him such evidence as would justify according to the law of England the committal for trial of the prisoner if the crime had been committed in England, and there must be a foreign warrant authorising the arrest duly authenticated according to the provisions of the Act. But it would seem that, if those conditions are complied with, the prisoner may be committed and the Secretary of State has power to signify to the magistrate that the requisition for the surrender has been made and to order the surrender of the criminal, and if he does not insist on the objection that a preliminary required by the treaty has not been complied with, we have no jurisdiction to interfere.

I am clearly of opinion, however, that the document relied on

(1) Law Rep. 8 Q. B. 410.

1882

THE QUEEN v. GANZ.

was a foreign warrant of arrest, duly authenticated both for the purposes of the Act and the treaty. I was not at first aware that the document bore the official seal of the department of justice and was an order of the High Court of Justice at the Hague. I think it is clearly a judicial document authorizing the arrest within the 26th section of the Act, and that it is authenticated as required by the 15th section. Though headed "copy" it seems to me really for this purpose to be an original document. There would, I suppose, be the record of this order on the records of the Court, but this would appear to be the document issued by the Court which authorizes the arrest. It seems to me, therefore, that this document comes within the meaning of the term "foreign warrant" as used by the Act, and that it is properly authenticated.

Application refused.

Solicitors for Crown: *Solicitor to the Treasury.*
Solicitors for prisoner: *Greenfield & Abbott.*

E. L.

April 3.

COX *v.* THE GREAT WESTERN RAILWAY COMPANY.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—*Railway Company—Negligence of a Person "in Charge of a Train upon a Railway."*

H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance:—

Held, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5, of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

ACTION under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), for personal injury sustained by the plaintiff whilst in the defendants' employ. The particulars of claim alleged that

the injury was caused by the negligence of one Hopker, a capstan-driver in the defendants' service, "the said Hopker being a person who at the time had the control of a train upon a railway within the meaning of sub-s. 5 of s. 1 of the Employers' Liability Act, 1880, and who negligently exercised such control."

The cause was tried before the deputy judge of the Marylebone county court on the 17th of March, 1882. The facts were in substance as follows:—The plaintiff, a youth of seventeen, was on the 30th of August, 1881, in the employ of the railway company at their goods station at Poplar as a capstan boy or scotcher, his duty being to scotch the trucks and to hang the rope on when they were being moved by the capstan. At the spot where the accident happened there were six lines of rail about 100 yards long; at each end of each line was a turn-table for the purpose of shifting the trucks to move them up successively to a platform to be unloaded or loaded; and this process was performed by means of two capstans at each end of the six lines of rail, which were worked by a man and a boy, the motive power being supplied by a fixed hydraulic engine, and communicated to the capstan by the man in charge of it placing his foot upon a treadle. Whilst the plaintiff was engaged, with the aid of the man under whom he was working, in moving a truck on the turn-table on one of the lines in order to attach it to a series of twelve trucks on the adjoining line, Hopker, who had charge of the capstan at the other end, inadvertently backed the twelve trucks and caught the plaintiff between the buffer of the last of the twelve and the buffer of the truck which the plaintiff was turning, and severely injured him. It was proved that the plaintiff was properly between the trucks for the purpose of removing an obstruction, it being what is called "lock-buffered:" and there was conflicting evidence as to whether or not Hopker had given the usual warning prior to putting his capstan in motion. One of the plaintiff's witnesses said that "the capstan-man moves any trucks he is ordered to move; he has no charge of any particular train."

On the part of the defendants it was submitted that there was no evidence to go to the jury of negligence on the part of Hopker; and, further, that Hopker was not a person who had the charge or control of a train upon a railway, for whose negligence the

1882

Cox v. Great Western Railway Co.

company could be made responsible within s. 1, sub-s. 5, of the Act.

The deputy judge declined to nonsuit, and, at the request and with the assent of the counsel on both sides,—the amount of damages being agreed,—he left two questions to the jury, viz.:—

1. If and so far as it may be a question for you, was Hopker a person who had the charge or control of a train upon a railway?

2. Was Hopker negligent?

The jury having answered both questions in the affirmative, the deputy judge ruled as matter of law that the injury complained of was not caused "by reason of the negligence of a person in the service of the defendants who had the charge or control of any signal, points, locomotive engine, or train upon a railway," within the meaning of s. 1, sub-s. 5, of the Act; and he therefore gave judgment for the defendants.

Lyon obtained a rule nisi to enter judgment for the plaintiff for the damages agreed upon.

R. S. Wright shewed cause. It would be manifestly a straining of language to call a mere labourer who is not called upon to exercise either intelligence or discretion, "a person who has the charge or control of a train upon a railway."

[MATHEW, J. If this man had not the control of the train, who had? Suppose the capstan had been moved by means of a handspike, or with the aid of a horse, would not Hopker have been the person in charge of the train?]

Trucks placed in the goods station for the mere purpose of being unloaded can hardly be called "a train upon a railway."

Lyon, in support of the rule. There is no definition of a "train" in the Act; but the dictionaries which are usually referred to define a train to be a series of carriages or other vehicles coupled together or placed one after another, as these trucks were; as, for instance, a train of artillery. And it can hardly be contended that a siding or goods station does not form part of the line of railway. If, instead of being a capstan driver, Hopker had been an ordinary engine-driver, there could have been no doubt. Hopker was the only person who could have set the trucks in motion; and he

admitted that it was his duty to give warning to those who might be on or about the line before he did so.

1882

Cox
v.
Great Western Railway Co.

Mathew, J. I think this rule should be made absolute. At the trial the judge put two questions to the jury. One was, whether Hopker was guilty of negligence. The jury found that he was. The other question was this, whether (so far as it might be a question for the jury) Hopker was a person who had the charge or control of a train upon a railway. This also the jury answered in the affirmative. A doubt was suggested as to whether the line of trucks here was "a train;" and that question has been raised upon the argument before us. If that was, as I think it was, a question of fact, was there any evidence that Hopker was a person having the charge or control of the train? He was the person who was working the capstan and who alone could put the train of trucks in motion. The language of the Act is that the plaintiff can only recover against his employers where he has sustained an injury "by reason of the negligence of a person in the service of the defendants who had the charge of any signal, points, locomotive engine, or *train upon a railway*." Did the twelve trucks constitute a train? It seems to me that they did. A train is a train, whether consisting of trucks laden with goods or of carriages filled with passengers. The character of the load makes no difference. Nor do I think that a locomotive engine is essential to the making of a train. The place where the accident occurred was clearly a part of the line of railway. I am of opinion that there should be judgment for the plaintiff for the amount of damages agreed upon.

Cave, J. I am of the same opinion. There is some little nicety whether a number of trucks in a goods station (as here) can properly be said to constitute a train. The trucks, twelve in number, were coupled together in the usual way. There was no locomotive engine attached to them; but the motive power was communicated to them through a capstan which was worked by a stationary hydraulic engine. If this had been a train on the line of railway with a locomotive, and Hopker had been the driver of the engine, he clearly would have been a person having the

1882

Cox v. Great Western Railway Co.

charge or control of the train within the meaning of the Act. Does it make any difference that there was no locomotive engine, but a stationary hydraulic engine and a capstan under his control, and that the place was a goods station into which the line of rails extends for the purpose of effecting the delivery of the contents of the trucks? Looking at the danger of putting these things in motion without proper warning, it seems to me to be immaterial whether the motive power was fixed or movable, or upon which portion of the line the accident happened. As the legislature have used words which are capable of being applied to such a case as this, I think we are justified in coming to the conclusion that the county court judge was wrong, and that Hopker was, as the jury have found he was, a person having the charge or control of a train upon a railway within the Act. There will, therefore, be judgment for the plaintiff for 70*l.*, the agreed damages, with costs.

Judgment for the plaintiff. Leave to appeal refused.

Solicitor for plaintiff: *R. H. Ward.*
Solicitor for defendants: *R. R. Nelson.*

J. S.

June 7.

PULLING *v.* THE GREAT EASTERN RAILWAY COMPANY.

Executor and Administrator—Damage to Estate of Intestate arising out of Injury to his Person—Medical Expenses—Loss of Wages.

The plaintiff sued as the administratrix of her late husband, who, whilst crossing the defendants' railway at a level crossing was, through the negligence of the defendants, run over by an engine and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value:—

Held, that the plaintiff could not sue in respect of damage to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable.

Statement of Claim was in substance as follows:—

The plaintiff was the administratrix of Edward Pulling, deceased, her husband, and he had commenced the action in his lifetime.

By an order of the Court the plaintiff had been substituted as plaintiff in the action in place of the said Edward Pulling, deceased. The plaintiff alleged that the said Edward Pulling while crossing the defendants' railway by a level crossing on a highway was, by and through the negligence of the defendants in and about the working of the defendants' railway and the management of an engine of the defendants, knocked down and run over by the engine, and sustained personal injuries. It was further alleged that in consequence of the aforesaid injuries the deceased was forced to leave his employment, and was prevented from the time when he was so injured until his death from following his occupation, and from deriving therefrom the wages and profits which he otherwise might and would have earned and acquired, and he also incurred expenses in obtaining medical attendance and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid.

Demurrer.

Lush Wilson, for the defendants, in support of the demurrer, was stopped by the Court.

Clay, for the plaintiff, in support of the statement of claim contdened that, inasmuch as damage had been occasioned to the estate of the intestate, he having incurred medical expenses and sustained pecuniary loss in his lifetime through his injuries, the action was maintainable by his administratrix under 4 Edw. 3, c. 7. [He cited *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1); *Leggott* v. *Great Northern Ry. Co.* (2); *Twycross* v. *Grant* (3); *Potter* v. *Metropolitan District Ry. Co.* (4); *Chamberlain* v. *Williamson* (5); *Lockier* v. *Paterson* (6); Williams, Saunders' Edition, 1871, p. 244.]

DENMAN, J. I think that our judgment must be in favour of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendants of their railway and engine, whereby the original plaintiff

(1) Law Rep. 10 C. P. 189.
(2) 1 Q. B. D. 599.
(3) 4 C. P. D. 40.
(4) 30 L. T. (N.S.) 765.
(5) 2 M. & S. 408.
(6) 1 C. & K. 271.

1882

PULLING v. GREAT EASTERN RAILWAY CO.

sustained personal injury. The present plaintiff, his administratrix, alleges that the effect of the tort was to cause him to incur medical expenses before his death, and in respect of those expenses it is contended that the action is maintainable. I do not think that we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim "actio personalis moritur cum personâ." To a certain extent that doctrine has been qualified. Under the Statute of Edward III. it has in many cases been held that, where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1), certainly does not go to that length, because the judgments in that case are expressly based upon the distinction in this respect between actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract. The case of *Leggott* v. *Great Northern Ry. Co.* (2) was decided upon the same principle as *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (1), though Quain, J., expressly dissented from the decision in that case so far as his personal judgment was concerned, and Mellor, J., did not express any approval of it, but considered himself bound by it as an authority. There was not anything said in the judgments in *Leggott* v. *Great Northern Ry. Co.* (2) to warrant our going to the length to which we should be going if in the present case we held that the maxim "actio personalis moritur cum personâ" did not apply. The duty, for breach of which the action was brought in that case, arose out of a contract, and the action was in substance for breach of contract to use due care towards the passenger whilst waiting for his train on the platform. Some of the expressions used by the judges in the case of *Twycross* v. *Grant* (3) seem no doubt to go to considerable lengths, but

(1) Law Rep. 10 C. P. 189. (2) 1 Q. B. D. 599.
(3) 4 C. P. D. 40.

those expressions must be construed with reference to the cause of action in that case. The cause of action there was not an injury to the person, but in respect of the pecuniary damage done to the intestate's estate by reason of the failure to perform the statutory obligation to disclose certain contracts. The present is an altogether different case. Here the tort complained of is an injury to the person arising from the defendants' negligence. There is no decision which supports the proposition that, because in consequence of such injury the person injured is put to expense, the case is brought within the category of cases to which the statute of Edward III. applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses. For these reasons I think our judgment must be for the defendants.

POLLOCK, B., concurred. (1)

Judgment for the defendants.

Solicitor for plaintiff: *J. F. Terry.*

Solicitor for defendants: *Curwood.*

E. L.

Distinguished. KITCHEN'S TRUSTEES v. MADDERS. [1949] 2 All E.R. 54.

JACK *v.* KIPPING.

Feb. 27.

Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 39, 49—*Set-off—"Mutual Dealings"—Unliquidated Damages—Fraudulent Representation on Sale of a Chattel.*

A claim for unliquidated damages for a fraudulent representation made by a bankrupt on the sale of a chattel is within the mutual credit clause (s. 39) of the Bankruptcy Act, 1869, and consequently may be set off in an action brought by the trustee for the unpaid price,—such fraudulent representation not being a mere personal tort, but a breach of the obligation arising out of the contract of sale.

STATEMENT OF CLAIM. That the plaintiff is the trustee of the estate and effects of R. Kelly, a liquidating debtor; that, before the commencement of the liquidation, Kelly sold and transferred to the defendant 420 shares in the Chemical and Ammoniacal

(1) It will be observed that the facts alleged did not bring the case within 9 & 10 Vict. 93, s. 1.

1882

JACK v. KIPPING.

Liquor Company, for 2700*l.*; that defendant has paid 2500*l.*; that the residue became due in August, 1878, and remained unpaid, and the defendant was indebted in the sum of 200*l.* to the plaintiff, as trustee; that Kelly, before the commencement of the liquidation, sold and transferred to the defendant sixty shares in the Belthel Water Company, payable on the 3rd of November, 1878, and the defendant became indebted to the plaintiff as trustee in that sum, and had not paid the same. Claim 450*l.*

Statement of defence. 1. The Chemical and Ammonaical Liquor Company was incorporated on the 6th of April, 1878, and Kelly was the principal promoter of the company and signed the memorandum of association thereof. He was also managing director, and planned and superintended the erection of the works; that Kelly was the registered holder of 420 shares in the company, and in July, 1878, represented to the defendant and to one Bell, that he was in difficulties, and wished to sell these shares, and [par. 4], in order to induce the defendant to buy them, stated to the defendant that the company's works were in good condition and all paid for, that the capital subscribed and paid up was sufficient for the working of them, that they were paying splendidly, and that the profits were so large that the works would pay for themselves in the first year.

Kelly made the above statements fraudulently with the intention of deceiving the defendant as to the condition and prospects of the company and the value of the said shares, and the defendant, believing, and relying on the truth of, the said statements, agreed to buy the 420 shares from Kelly for 2700*l.*, and paid him 1150*l.* on account of the purchase-money, Bell providing the residue. That the statements above mentioned were entirely false, to the knowledge of Kelly.

14. Bell on the 10th of May, 1875, by a bill of exchange now overdue, directed to Kelly by the name of R. Kelly & Co., required Kelly to pay to him, Bell, or his order, 145*l.* 11*s.* 9*d.* four months after date, and Kelly before the date of his liquidation accepted the bill, and Bell indorsed the same to the defendant, but Kelly has not paid the same; and the defendant is willing to set off the amount thereof against any sum which may be found due from him to the plaintiff as trustee.

1882

JACK v. KIPPING.

By way of set-off and counter-claim, the defendant repeated the above allegations, and stated that the shares [in par. 4 of the statement of claim] were and had always been since the date of the defendant's purchase worthless, and that the defendant had lost the 1150*l.* so paid to Kelly for the same; and the defendant claimed to set off as against any sum found due to the plaintiff the 1150*l.* as damages, and 145*l.* 11*s.* 9*d.* the amount of the bill.

The plaintiff demurred to par. 14 of the statement of defence, on the ground that it did not shew that the defendant was holder of the bill at the commencement of the liquidation; and to the set-off and counter-claim (except the repeated par. 14), on the ground that the claims sought to be set off were not proveable under the liquidation, and could not be set-off.

Terrell, for the plaintiff. There is no allegation that the defendant was the holder of the bill mentioned in par. 14 of the statement of defence; and set-off is only applicable to mutual dealings between the bankrupt and a creditor anterior to the commencement of the liquidation: 32 & 33 Vict. c. 71, s. 39. (1) That section deals merely with mutual debts and credits arising from mutual dealings between the parties, and not with claims for damages for a personal tort, such as fraud or misrepresentation, from which the bankrupt is not released by his discharge: see s. 49. (2)

R. H. Collins, for the defendant. The 14th paragraph sufficiently shews that the bill is in the hands of the defendant and unpaid.

(1) 32 & 33 Vict. c. 71, s. 39, "where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in case where he had at the time of giving credit to the bankrupt notice of any act of bankruptcy committed by such bankrupt, and available against him for adjudication."

(2) Sect. 49, "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud."

1882

JACK v. KIPPING.

[CAVE, J. It does not state when the bill was indorsed by Bell to the defendant.]

It follows the form in common use: see Bullen & Leake 4th ed. 96. The tort relied on here is not an independent personal tort so as to come within the rule adverted to in *Peat* v. *Jones & Co.* (1) It is a breach of an obligation arising out of a contract of sale; and, in giving judgment in that case, the Master of the Rolls says (2): "What we have to consider is, whether such claims as these,"—claims for unliquidated damages,—"are properly the subject of set-off or not. I think that they are, because a contract of sale and purchase is in its nature mutual, imposing reciprocal obligations on the vendor and purchaser. Any claim arising out of the mutual dealings could be set off."

Terrell, in reply. A debt arising out of a personal fraud of the bankrupt (which this is), cannot be the subject of a set-off in an action by the trustee, nor can it be proved under the bankruptcy. His discharge does not release him from his responsibility in respect of it: s. 31.

Cur. adv. vult.

Feb. 27. The judgment of the Court (Mathew and Cave, JJ.) was delivered by

CAVE, J. The question in this case is whether, when the purchaser of shares is sued for the price by the trustee of the vendor who has become bankrupt, he is entitled to set off a claim for unliquidated damages for a fraudulent misrepresentation whereby he was induced to purchase the shares.

We are of opinion that the case is governed by *Peat* v. *Jones & Co.* (1), and that he is so entitled on the ground taken by the Master of the Rolls, that a contract of sale and purchase is in its nature mutual, imposing reciprocal obligations on the vendor and purchaser, and consequently that claims arising out of that contract are mutual dealings within the statute.

It seems to us that it would be inequitable to hold that, where a purchaser has had an article which turns out to be worthless palmed off on him by fraudulent misrepresentations, and the

(1) 8 Q. B. D. 147. (2) At p. 149.

vendor has become bankrupt, he should be compelled to pay the agreed price to the trustee, and be left to recover back as much as he can in the shape of a dividend. It is said that such a fraudulent misrepresentation is a tort; but we think that it is not a personal tort, but a breach of the obligation arising out of the contract of sale.

It was argued that, as by s. 49 of the Bankruptcy Act, 1869, the order of discharge is not to release the bankrupt from any debt or liability incurred by means of any fraud, it follows that such a debt is not provable in the bankruptcy, and consequently cannot be set off. But it is quite clear that that is not the meaning of the section; and the very expression "liability incurred by means of fraud" implies that in some cases a liability arising out of fraud which is not a debt may be proved in bankruptcy.

As to the 14th paragraph, that is clearly bad, and therefore as to that there will be judgment for the plaintiff, unless the defendant amends within a week. As to the residue of the set-off there will be judgment for the defendant: and, as each party has succeeded in part, there will be no costs.

Judgment accordingly.

Solicitors for plaintiff: *White, Collison, & Prichard.*

Solicitors for defendant: *Le Riche & Son, for R. W. Stead, Manchester.*

J. S.

1882
March 24.

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA *v.* THE NETHERLANDS INDIA STEAM NAVIGATION COMPANY, LIMITED.

Ship — Bill of Lading — Exceptions — Collision — Negligence of Servants — Variance between Rules of Admiralty and Common Law Courts—Judicature Act, 1873, *s.* 25, *sub-s.* 9.

The plaintiffs shipped goods on board the defendants' vessel, the *Crown Prince*, under a bill of lading which contained an exception of, amongst other things, "collision" and "accidents, loss, or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company, in navigating the ship." In the course of the voyage the *Crown Prince* came into collision with another vessel of the defendants, the *Atjeh*. The collision was due to negligence, for which the *Atjeh* was mainly in fault, but the *Crown Prince* was also in some degree to blame:—

Held, that the defendants not having shewn that the loss was occasioned wholly by the neglect or default of their servants on the *Crown Prince* were liable:

Held, also, that s. 25, sub-s. 9, of the Judicature Act, 1873, is confined to cases in which a variance existed before the passing of the Act between the rules in force in the Common Law and the Admiralty Courts, and did not apply to limit the liability of the defendants in the present case to one half the loss of the plaintiffs.

Varied in appeal (Q.B.D. 521 C.A.).

MOTION to enter judgment.

The action was brought by the plaintiffs, as owners of goods shipped under a bill of lading in the defendants' vessel, the *Willem Kroon-Prins der Nederlander* (called hereafter the *Crown Prince*), and lost through a collision between that vessel and the *Atjeh*, another vessel of the defendants.

The jury, at the trial, found that the *Atjeh* was mainly in fault in causing the collision, but that the *Crown Prince* was also in some degree to blame. The bill of lading excepted, among other things (1) collision, (2) accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, master or mariners, or other servants of the company, in navigating the ship. The questions were whether the defendants were exempt from liability by these exceptions, and whether, if not exempt, they were liable for the whole loss, or whether, by the Judicature Act, 1873, s. 25, sub-s. 9, the Admiralty rule, as to dividing the loss when two ships in collision are both to blame, applied.

Butt, Q.C., Myburgh, Q.C., and *Barnes*, for the plaintiffs. The only question is, what is the contract in the bill of lading to which the English law must be applied: *Lloyd* v. *Guibert.* (1) That contract excepts collision and other perils of the sea, but the exception does not apply where the negligence of the crew caused the collision or other peril: *Lloyd* v. *General Iron Screw Collier Co., Limited* (2); *Grill* v. *General Iron Steam Collier Co., Limited* (3); *Phillips* v. *Clark* (4); *Czech* v. *General Steam Navigation Co.* (5) The negligence of the crew of the *Crown Prince* is no doubt excepted, but the collision did not arise from that, but from that and another cause which is not touched by the bill of lading, namely, the negligence of the crew of the *Atjeh.* It is immaterial in considering the contract whether the crew of the *Atjeh* were the servants of the defendants, but if it were material it is clear that the defendants would still be liable for the tort committed by their servants on the *Atjeh.*

Benjamin, Q.C., Cohen, Q.C., and *Raikes*, for the defendants. The liability of the defendants ought to be decided under the law of Holland, by which they would not be liable for the negligence of the master of the *Crown Prince.* It is a question not who are the shareholders, but what is the flag: *The Halley* (6); *Phillips* v. *Eyre.* (7) As to the contract, it excepts negligence of the defendants' servants, which was not excepted in the cases cited, and consequently it excludes collision, although caused by negligence of the crew. The collision arose in part from the perils excepted, and the plaintiffs must shew how much of the loss arose from perils not excepted, or they cannot recover at all. Collision is one of the excepted perils, so that primâ facie the defendants would not be liable. Then it is said they are liable because the collision arose from the defendants' neglect; but the neglect of servants on the *Crown Prince* is excepted, and the defendants are not liable under the contract for collision caused by their servants or any one else on any other ship.

Cur. adv. vult.

(1) Law Rep. 1 Q. B. 115.
(2) 3 H. & C. 284.
(3) Law Rep. 1 C. P. 600; Law Rep. 3 C. P. 476.
(4) 2 C. B. (N.S.) 156.
(5) Law Rep. 3 C. P. 14.
(6) Law Rep. 2 P. C. 193.
(7) Law Rep. 6 Q. B. 1.

1882

March 24. The following judgments were delivered:—

CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO.

10 QBD 522

POLLOCK, B. This is an action brought by the plaintiffs, who are bankers carrying on business in London, against the defendants, who are a joint stock company, limited, constituted and duly registered pursuant to the Companies Act, 1862, having their head office in London, to recover the value of a quantity of specie which in the month of November, 1875, was shipped by the plaintiffs at Singapore on board the defendants' steamship called *Willem Kroon-Prins der Nederlander* (which I shall call the *Crown Prince* for the sake of brevity) to be carried by the defendants from Singapore to Sourabaya, and there delivered in good order and condition to the order of the plaintiffs, they paying freight for the same upon the terms of the bill of lading, which contained the following exceptions: "The act of God, the king's enemies, restraint of princes and rulers, pirates or robbers by sea or land, accidents, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam, and all the perils, dangers, and accidents of the sea, rivers, land carriage and steam navigation, of whatsoever nature and kind soever; and accidents, loss or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship or from any deviation excepted."

The *Crown Prince* sailed from Singapore on her voyage to Sourabaya, and in the course of it she came into collision with another steamship of the defendants called the *Atjeh*, and was sunk with the plaintiffs' specie on board. Some of the specie was recovered, and the action is brought to recover the value of the residue which was lost.

The plaintiffs alleged by their statement of claim (par. 4), that the collision was caused by the negligence of the defendants' servants on board the *Atjeh*, and that the loss of the specie was not caused by any of the perils excepted from the bill of lading. The defendants, by their statement of defence, admitted that their steamship the *Crown Prince*, in the course of her voyage came into collision with their steamship called the *Atjeh*, and was sunk with the plaintiffs' goods on board, but they denied that the collision was caused by negligence, and alleged that if it was so caused such negligence was wholly that of their servants on board

1882

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

their ship the *Crown Prince*, and that such negligence is one of the perils specially excepted in and by the bill of lading. The defendants also denied the allegation in the 4th paragraph of the plaintiffs' statement of claim, that the loss was not caused by any of the perils excepted by the bill of lading. In other words, they alleged that the loss was caused by a peril or by perils excepted by the bill of lading. The plaintiffs joined issue upon the defendants' statement of defence.

The cause came on for trial at the Guildhall Sittings, on the 15th of December last, before Manisty, J., and a special jury. A great deal of evidence was given on both sides as to the cause of the collision, and in the result the jury found that the *Atjeh* was mainly in fault, but that the *Crown Prince* was also in some degree to blame.

Upon these facts it was contended before us on the part of the plaintiffs, that the defendants are liable for the loss of the specie, first by reason of the contract into which they had entered by the bill of lading for carriage of it, and secondly that they are liable in tort as owners of the *Atjeh*, for the negligence of their servants the master and crew of that vessel whereby the collision was mainly occasioned. In the view which I have taken of this case, it becomes unnecessary to consider the questions which arise out of the second contention.

As to the first question it was suggested for the defendants that the contract contained in the bill of lading was not governed by English law. I cannot, however, think that there is room for serious argument upon this point. The goods were shipped at an English port. The plaintiffs are an English company. The defendants are a limited company whose registered office is in London, and by their memorandum of association they describe as one of the objects for which the company is established the hiring of vessels. The bill of lading is in the English language throughout, and the defendants are therein described as "the Netherlands India Steam Navigation Company, Limited," which obviously has reference to the Companies Act, 1862, whereby the liability of the members of limited companies is limited to the amount unpaid on the shares held by them, or to the amount which the members may undertake by the memorandum of asso-

1882

CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO.

ciation to contribute to the assets of the company in the event of its being wound up. Under all these circumstances, adopting the well-known rule of law as acted upon in *Lloyd* v. *Guibert* (1), the law of the place where the contract is made is primâ facie that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and there exist here none of those facts from which the Court were in that case led to infer the contrary.

Assuming then that the English law governs, two matters must be dealt with before the liability of the defendants can be determined, viz.: First, what is the true construction of the bill of lading? and, Secondly, have the defendants succeeded in shewing that the event whereby the loss of the plaintiff's specie was occasioned was within the excepted perils.

With regard to the perils excepted by the bill of lading, they may be divided into two classes; first, those which are dealt with by the first clause and mentioned by name, one of these being "collision;" and, secondly, those which are covered by the second clause, which provides for "accidents, loss, or damage from any act, neglect or default whatsoever of the pilots, masters, or mariners, or other servants of the company in navigating the ship," which would include all acts so caused, and therefore, inter alia, collision, if it was caused by the neglect or default of the defendant's servants in navigating the *Crown Prince*.

Dealing first with the second of these clauses, it is obvious that had the loss been occasioned wholly by those who were navigating the *Crown Prince*, the defendants would have been protected; but the jury having found that the crew of the *Atjeh* were mainly in fault, although the *Crown Prince* was also in some degree to blame, it appears to me that the defendants are not protected by this clause, inasmuch as they have not succeeded in shewing that the loss was occasioned wholly by the neglect or default of those who were navigating the *Crown Prince*.

With respect to the first clause, there is no doubt that the loss in question was occasioned by collision, and the only question that arises is, whether the word "collision," as here used, applies to a collision which was mainly brought about by the negligence

(1) Law Rep. 1 Q. B. 115.

10 QBD 523

of those who were servants of the defendants engaged in the navigation of one of their vessels other than that in which the specie was shipped. It is necessary here to bear in mind that the clause in question is inserted in limitation of the common law liability which would otherwise attach to the defendants in the discharge of their duty as carriers, and should its intention and effect be open to doubt, it must be construed most strongly against the carriers. This proposition is very clearly dealt with by Story, J., in s. 512A of his work on Bailments, in which, speaking of the well-known and long established exception contained in maritime contracts for the carriage of goods of "perils of the sea," he says, "the phrase, 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accident peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still, in either case, be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is, that, if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party."

The same principle of construction has been acted upon by the English Courts and applied to the case of a loss occasioned by collision. Thus, in *Lloyd* v. *General Iron Screw Collier Co., Limited* (1), it was held that the exception in the bill of lading of "accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever," did not exempt the shipowner from responsibility for the loss of goods which arose from a collision caused by the negligence of the master or crew. This decision was discussed and followed in *Grill* v. *General Iron Screw Collier Co. Limited.* (2) A similar construction was given to a bill of lading which contained a clause that the shipowner "is

(1) 3 H. & C. 284.

(2) Law Rep. 1 C. P. 600.

1882

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION CO.

not to be accountable for leakage or breakage;" in the earlier case of *Phillips* v. *Clark* (1), and more recently in *Czech* v. *General Steam Navigation Co.* (2) These cases shew that but for the general words excepting the neglect or default of the defendants' servants in navigating the *Crown Prince*, the defendants would not be protected in the event of a collision occasioned by such neglect or default, and as there are no words in the bill of lading which apply to a collision arising from the neglect or default of the defendants' servants in navigating another vessel, the word "collision" itself is of no avail, and it is hardly necessary to add that where goods are damaged by reason of a collision occasioned by the fault of the master or crew of a vessel other than that in which they are shipped, or by the default of those on board both vessels, the owner of the carrying vessel, in the absence of an express stipulation to the contrary, is liable for their loss. The law as to this will be found in 3 Kent's Commentaries, lecture xlvii. s. 5, and in Parson's Law of Shipping, vol. 1, p. 260.

It was pressed upon us by the defendants' counsel in argument that it bore hardly upon the defendants to extend their liability beyond the negligence of those of their servants who were engaged in carrying out the contract of carriage, and that it ought not to be supposed that under any circumstances they could intend to make themselves liable for the acts of their servants who were navigating another vessel whose duties had no connection with the performance of the contract for carriage upon which the plaintiffs are suing. There is much that is plausible in this, but it only raises in another form the question already answered by saying the defendants as carriers are liable for all events other than the act of God, which they have not excepted by their bill of lading, and although, if the collision had taken place between two ships which were the only vessels owned by the defendants, and these were engaged in wholly different voyages and happened to meet by accident upon the high seas, the result might appear to be more unforeseen and peculiar, in the present case it must be remembered that the defendants are owners of ships which are engaged in a carrying trade between certain fixed ports and make regular voyages over the same seas,

(1) 2 C. B. (N.S.) 156. (2) Law Rep. 3 C. P. 14.

and to say that they are liable for a loss occasioned by the negligence of their crews on board a vessel other than that in which the plaintiffs' goods are shipped, is only to apply a rule the equity of which would not be contested if it were applied to a carrying company who own a large fleet of vessels trading in such a manner to and from a port that in the course of their voyage they would constantly pass or meet in a river or harbour, or would be brought up in close proximity to the same landing wharf.

The liability of the defendants being established a question still arises, what is the proper amount of damages? Until recently the defendants, who had contracted to carry the specie in question from Singapore to Sourabaya, and had failed to do so by reason of a peril against the occurrence of which they were not protected by the contract of carriage, must have been held to be liable for the full value of the specie. A doubt however has been raised by reason of the language contained in s. 25, sub-s. 9, of the Judicature Act, 1873. The language of that sub-section is as follows:—"In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." If this provision is applicable to the present case, inasmuch as both the *Crown Prince* and *Atjeh* were found by the jury to have been in fault, the Court of Admiralty rule must be held to apply, and that rule is that where both parties to a collision are to blame they must share the loss equally. See *The Milan* (1) and *Hey* v. *Le Neve.* (2)

The language of this sub-section is no doubt very general, but before effect is given to it, it would seem necessary to refer to what was the condition of the law before the passing of the Judicature Act. The only "cause or proceeding for damages arising out of a collision between two ships," in which the rules in force in the Court of Admiralty were at variance with those in force in the Common Law, were cases in which actions were brought by the owner of one ship against the owner of another ship, or by the owner of goods on board one ship against the owner of another ship in respect of a collision. In either of these

(1) Lush. 388. (2) 2 Shaw, Scotch Ap. Cas. 395.

1882

CHARTERED MERCANTILE BANK OF INDIA v. NETHERLANDS INDIA STEAM NAVIGATION Co.

cases the Admiralty rule and the Common Law rule with respect to damages differed, the Admiralty rule being as I have already expressed it, and the Common Law rule being that where both vessels were in fault, in the sense that those navigating the plaintiff's ship were guilty of negligence which substantially contributed to the collision, the plaintiff could not recover.

It was I apprehend to prevent this variance, and to make the practice in both Courts uniform, that this sub-section was passed; but it seems to me equally clear that its effects must be confined to those cases in which such variance previously existed. Where the action is brought not by one shipowner or goods owner against a ship which has run into the carrying vessel, but by the goods owner, who seeks to enforce the contract for carriage against the owner of the ship to whom he has entrusted his goods, no such variance in practice could arise. The result therefore is, there will be a verdict and judgment for the plaintiffs, the damages to be agreed.

MANISTY, J. I concur with my Brother Pollock in the conclusions at which he has arrived, and in the reasons which he has stated in support of them; but as the case is somewhat novel and it will probably be submitted to a higher tribunal, I wish to add a few observations of my own as to the liability of the defendants upon their contract.

The question which lies at the root of the case is to what cause ought the loss of the plaintiffs' goods to be attributed? Doubtless the collision of the defendants' ship, the *Crown Prince,* with the defendants' ship the *Atjeh* was the causa proxima, but according to the finding of the jury the negligence of the defendants' servants on board the two ships was the causa causans, in other words, the efficient cause of the loss.

Now it is a settled rule of law that in the case of an action on a contract of marine insurance regard is to be had to the causa proxima: *Thompson* v. *Hopper* (1); but in the case of an action for breach of a contract contained in a bill of lading regard is to be had to the causa causans: *Lloyd* v. *General Iron Screw Company* (2), and the other cases cited by my Brother Pollock.

(1) E. B. & E. 1038. (2) 3 H. & C. 284.

It was conceded on the part of the defendants that, but for the express exception in the bill of lading of the negligence of their servants on board the *Crown Prince*, they would have been liable for the loss in question, notwithstanding "collision" is one of the excepted perils in the bill of lading, but they contend that without any express exception of the negligence of their servants on board the *Atjeh* they are protected by the exception of "collision."

I am unable to see any sound ground for the distinction between the negligence of the defendants' servants on board the *Crown Prince* and similar negligence of their servants on board the *Atjeh*. No authority was cited in support of it, but it was contended that there was an implied contract in the bill of lading that the defendants' servants on board the carrying ship (the *Crown Prince*) would use all reasonable care to carry safely, and that consequently it was necessary expressly to except their negligence, whereas there was no such implied contract with respect to their servants in any other ship, and therefore there was no need of any express exception of their negligence. It seems to me that this argument admits of a ready answer, viz., that there is no implied contract whatever in the case. The contract contained in the bill of lading is express, namely, to carry the goods safely and deliver them in good order and condition, subject to certain specified exceptions which do not include the negligence of their servants on board their ship the *Atjeh*.

Having regard to the finding of the jury, namely, that the *Atjeh* was mainly to blame, but that the *Crown Prince* was in some degree to blame, I think the defendants are liable by virtue of their contract for the whole of the loss.

STEPHEN, J. I have nothing to add to the judgment of my Brother Pollock, in which I concur.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Lovell, Son, & Pitfield.*

A. M.

1882
May 17.

[IN THE COURT OF APPEAL.]

JENKINS *v.* JONES.

*Vendor and Purchaser—Vendor out of Possession—Right of Entry—*32 *Hen.* 8, *c.* 9, *s.* 2—8 *& 9 Vict. c.* 106, *s.* 6—*Measure of Damages—Sale of Land—Covenants for Title and Quiet Enjoyment*

Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by 8 & 9 Vict. c. 106, s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands.

A. sought to recover by ejectment certain lands; the person in possession, amongst other defences, alleged that one-fourth share thereof belonged to B., who had never been in possession. Thereupon A., for the sum of 10*l.*, took from B. a conveyance dated the 4th of July, 1877, of his share, containing covenants for title and quiet enjoyment. The actual value of B.'s share was 500*l.* A. then recovered possession of the lands. Before the date of the conveyance B. had been bankrupt, and after A. had recovered possession of the lands, B.'s trustees in bankruptcy recovered possession from A. of the one-fourth share which had been conveyed by B. to A. In an action by A. against B. for damages for breach of the covenants for title and quiet enjoyment:—

Held, that the conveyance to A. from B. was not rendered void by 32 Hen. 8, c. 9, s. 2.

Held, also, that A. was entitled to recover from B. the sum of 500*l.* as damages.

THE claim contained in substance the following allegations:—

By deed dated the 4th of July, 1877, and made between the defendant of the one part, and the plaintiff and his wife of the other part, the defendant granted unto the plaintiff and his heirs the defendant's one fourth share in certain farms and lands in the parish of Kilcennin, in the county of Cardigan, to hold the said premises to the plaintiff and his heirs to such uses as the plaintiff's wife should by deed appoint, and in default of any such appointment to the use of the plaintiff, his heirs and assigns. By the deed above-mentioned the defendant covenanted with the plaintiff as follows:—"And the said J. L. Jones doth hereby for himself, his heirs, executors, and administrators, covenant with the said J. Jenkins, his heirs and assigns, that notwithstanding anything

by him, the said J. L. Jones, done or knowingly suffered, he, the said J. L. Jones, now hath power to grant all the said premises hereinbefore expressed to be hereby granted to the uses aforesaid, free from incumbrances; and that all the said premises may be quietly entered into, held, and enjoyed by the said J. Jenkins, his heirs and assigns, without any interruption by the said J. L. Jones or any person claiming through or in trust for him." The fee simple in the one-fourth share of the above-mentioned farms and lands, which was expressed to be granted by the deed of the 4th of July, 1877, had been devised to the defendant by D. Lloyd, the defendant's grandfather, who died in the year 1851, and upon the death of D. Lloyd vested in the defendant as an estate in remainder, subject to certain life estates, which determined and came to an end before the 4th of July, 1877. About the 1st of August, 1867, the defendant had been adjudged a bankrupt in the Birmingham Bankruptcy Court, and under the Bankruptcy Act, 1869, all the property of the defendant became vested in J. Cole and E. Parry, the registrars of the Court, as trustees in bankruptcy of the defendant's estate. After the execution of the deed of the 4th of July, 1877, the defendant's trustees in bankruptcy brought an action against the tenants in possession of the above-mentioned farms and lands to recover possession of the one-fourth share thereof formerly vested in the defendant, and recovered judgment for it, and obtained possession and enjoyment of it. The plaintiff claimed 1000*l.* damages.

The defendant, by his defence, substantially admitted the statements in the claim, except the execution of the deed; he alleged that the plaintiff upon the execution of the deed paid to him 10*l.* and no more as the purchase-money of the defendant's share in the property; he as an alternative defence paid 12*l.* 10*s.* into Court, and pleaded the following paragraph:—

"The defendant further says that neither he nor any person through whom he claimed the said lands or any of them in the statement of claim mentioned, had been in possession of any of the said lands or of the reversion or remainder thereof, or of any of the profits of the said lands, for the space of one whole year next before the execution of the said deed in the statement of

1882

JENKINS v. JONES.

claim mentioned, and that at the time of the execution of the said deed the plaintiff well knew all the matters in this paragraph mentioned."

The plaintiff joined issue.

The action came on for trial at the summer assizes, 1881, held at Swansea before Pollock, B., without a jury, when the deed of the 4th of July, 1877, was proved or admitted. It also appeared that at the time when the deed was executed the farms and lands were in possession of a person who, in answer to an action of ejectment by the now plaintiff, alleged that the now defendant was entitled to one fourth thereof. The plaintiff after the execution of the deed recovered possession of the farm and lands, but was deprived of the possession of the one-fourth thereof by the defendant's trustees in bankruptcy, as is above stated. The real value of the defendant's one-fourth share was agreed to be 500*l.* The learned judge reserved the case for further consideration, and ultimately directed that judgment should be entered for the defendant.

The plaintiff appealed.

May 2. *McIntyre, Q.C.*, and *F. A. Bosanquet* (*G. B. Hughes*, with them), for the plaintiff. The defendant, by his defence, has relied upon the provisions of 32 Hen. 8, c. 9, s. 2; but the facts do not bring the case within that enactment. The defendant's estate was not fictitious, and it was not a "pretenced" right or title. It is true that at common law a right of entry could not be sold, but this doctrine has been abolished by 8 & 9 Vict. c. 106, s. 6 (1), and 32 Hen. 8, c. 9, s. 2, was only aimed at the sale of titles which were in reality fictitious.

[JESSEL, M.R. The plaintiff bought the defendant's share whilst the title to the lands was in litigation: the transaction seems to me to amount to champerty. The case falls within 32 Hen. 8, c. 9, s. 2.]

It is submitted that no champerty existed because the defendant

(1) By 8 & 9 Vict. c. 106, s. 6, "a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed."

sold a bonâ fide claim: it has been held that there was no champerty in an agreement to enable the bonâ fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase: *Williams* v. *Protheroe.* (1)

[BRETT, L.J. The whole contract is rendered illegal by 32 Hen. 8, c. 9, s. 2, if that enactment is still in force.]

At all events, 8 & 9 Vict. c. 106, s. 6, has repealed, by implication, 32 Hen. 8, c. 9, s. 2; for it allows rights of entry to be conveyed, and this is inconsistent with the existence of the earlier statute. In Sugden on Vendors and Purchasers, 14th ed. c. 12, s. 4, p. 496, and in Williams on Seisin of Freehold, p. 125, it is laid down in general terms that by force of 8 & 9 Vict. c. 106, s. 6, all rights of entry are assignable by deed, except rights of entry for condition broken: *Hunt* v. *Bishop* (2); *Hunt* v. *Remnant.* (3)

[JESSEL, M.R. The reason why a right of entry for condition broken was not assignable by virtue of 8 & 9 Vict. c. 106, s. 6, may be taken to be, that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition. Has not the effect of that statute been extended by subsequent legislation?]

[*H. Matthews, Q.C.*, for the defendant. By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 10, sub-s. 1, a condition for re-entry passes together with the reversionary estate immediately expectant on the term granted by a lease.]

The doctrine as to selling "pretenced" titles is now inapplicable, and the principles laid down in *Partridge* v. *Strange* (4), and *Doe* d. *Williams* v. *Evans* (5), cannot be relied upon by the defendant. By 7 Wm. 4 & 1 Vict. c. 26, s. 3, rights of entry of every description may be disposed of by will.

[BRETT, L.J. No argument derived from that statute can assist us; for 32 Hen. 8, c. 9, s. 2, did not extend to devises.]

Then as to the question of damages, it is submitted that the

(1) 5 Bing. 309.
(2) 8 Ex. 675.
(3) 9 Ex. 635.
(4) Plow. 77.
(5) 1 C. B. 717.

1882

JENKINS v. JONES.

plaintiff is entitled to recover the actual value of the land, and not merely the amount which he paid: *Lock* v. *Furze*. (1)

H. Matthews, Q.C., and *Kenelm Digby*, for the defendant. The defendant did not sell to the plaintiff a mere right of entry; this might have been lawful under 8 & 9 Vict. c. 106, s. 6: but the transaction between the parties was really the sale of a lawsuit. The defendant claimed some title to the farm and lands: the present case is not like *Cook* v. *Field* (2); it falls within the principle of *Doe* d. *Williams* v. *Evans*. (3) It is against public policy that a lawsuit should be assigned: *Prosser* v. *Edmonds*. (4) It is clear from the authorities cited in 1 Dart on Vendors and Purchasers, 5th ed. c. 6, s. 6, p. 239, that the sale to the plaintiff from the defendant fell within the prohibition of 32 Hen. 8, c. 9, s. 2. Upon the sale to the plaintiff the defendant's title became "pretenced" within that enactment: Co. Litt. 369 a. Further, the trustees in bankruptcy did not claim through the defendant by any voluntary act of his own: they took his interest by virtue of the law as to bankruptcy, and this is no breach of the covenants for title and quiet enjoyment: *Stanley* v. *Hayes*. (5)

As to the damages, the amount paid into Court is sufficient: the plaintiff can only recover the amount which he paid: he is not entitled to the full value of the land.

McIntyre, Q.C., replied.

Cur. adv. vult.

May 17. The judgment of the Court (Jessel, M.R., Brett and Cotton, L.JJ.) was delivered by

COTTON, L.J. This is an action to recover damages for breach of covenants for title and quiet enjoyment, contained in a deed of the 4th of July, 1877, whereby the defendant granted to the plaintiff one-fourth share of farms and lands in the county of Cardigan. There has been a clear breach of the covenants, and the defence relied upon by the defendant was that the deed and the covenants therein contained were void under the Act of 32 Hen. 8, c. 9. At the trial of the action the jury were, by

(1) Law Rep. 1 C. P 441.
(2) 15 Q. B. 460.
(3) 1 C. B. 717.
(4) 1 Y. & C. (Ex.) 481.
(5) 3 Q. B. 105.

agreement, discharged, and the case left to Pollock, B., for his decision. He gave judgment on the defence above referred to in favour of the defendant. The principal, if not the only, point argued before us was that the statute 8 & 9 Vict. c. 106, s. 6, had impliedly repealed the statute of Hen. 8.

The facts of the case may be very shortly stated. The estate, one-fourth of which the defendant purported to convey to the plaintiff, had many years ago been settled. The plaintiff was the heir-at-law, and the defendant the devisee, of the person entitled under the ultimate limitations of the settlement. When the previous limitations of the settlement determined, the estate was in possession of a person against whom the plaintiff in the action, as heir-at-law of the ultimate remainderman under the settlement, brought an action to recover possession of the estate. The defendant in this action of ejectment, denied the title of the man as whose heir the plaintiff claimed, and suggested that if he had any title, the one-fourth was vested, not in the plaintiff as heir-at-law, but in the defendant as devisee. Thereupon the plaintiff bought and took a conveyance from the defendant of his interest as devisee. He then recovered the estate; but previously to the year 1877, the defendant had been bankrupt, and the trustees under his bankruptcy claimed from the plaintiff and recovered the one-fourth of the estate which the deed of 1877 purported to convey.

The statute 8 & 9 Vict. c. 106, does not in terms repeal the Act of Hen. 8, and to determine whether it does so by implication, it is necessary to consider the true meaning and effect of the earlier Act. Sect 2 of the Act of Hen. 8, is that on which the defendant relies. This section is as follows: "No person nor persons of what estate, degree, or condition soever he or they be, shall from henceforth bargain, buy or sell, or by any ways or means obtain, get or have any pretenced rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons in or to any manors, lands, tenements, or hereditaments (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors, or they by whom he or they claim the same, have been in

1882

JENKINS v. JONES.

possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year next before the said bargain, covenant, grant, or promise made) upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, do forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted or granted, contrary to the form of this Act; and the buyer and taker thereof knowing the same, do forfeit also the value of the said lands, tenements, or hereditaments so by him bought or taken as is abovesaid; the one half of the said forfeitures to be to the King our Sovereign Lord and the other half to the party that will sue for the same in any of the King's Courts of record by action of debt, bill, plaint, or information; in which action, bill, plaint, or information, no essoin, protection, wager of law, nor injunction shall be allowed."

It will be observed that the first provision against buying or selling speaks of "pretenced" rights or titles, while the second provision against taking any promise or covenant, omits the word "pretenced." But, in our opinion both branches of the section refer to the same class of rights and titles. There can be no reason why it should be penal to take a covenant for sale of rights and titles generally, but in case of actual sale penal to sell only when the right or title is "pretenced." In our opinion the second branch of the enactment should be read as if it was any *such* title, and both should be held to apply to dealings with "pretenced" rights and titles, and this, we think, agrees with the opinion expressed by the Chief Justice in *Partridge* v. *Strange*. (1) The question, therefore, is, what is a "pretenced" right or title within the meaning of the statute? This term, in our opinion, applies either to a title, for which in fact there is no foundation, a fictitious title, or to a right or title, which, though not fictitious, was not, as the law stood at the date of this enactment, capable of being conveyed. This is, we think, the true result of what is stated by Coke in dealing with the statute, and by Tindal, C.J., in *Doe* d. *Williams* v. *Evans*. (2) The former (Co. Litt. 369 a) says: "For the better understanding of which statute you must

(1) Plow. 88. (2) 1 C. B. 724.

observe, that title or right may be pretenced two manner of ways: first, when it is merely in pretence or supposition, and nothing in verity; secondly, when it is a good right or title in verity, and made pretenced by the act of the party: and both these are within the said statute." What is said by Coke as to the second kind of "pretenced" title is not very clear; but Tindal, C.J., we think, explains what is at least one of the second class of "pretenced" titles, when in *Doe* d. *Williams* v. *Evans* (1), he says: "The course of the common law was well known at the time, and the statute was not intended to alter it, but merely to superadd a penalty. The authority cited from Plowden, seems quite decisive. He says: 'I take the statute, that, if he who is out of possession bargains or sells, or makes any covenant or promise to part with the land after he shall have obtained the possession of it, this shall be within the danger of the statute, whether he who so bargains, sells, or promises, have a good and true right or title or not; and in this point the statute has not altered the law; for the common law, before this statute, was, that he who was out of possession might not bargain, grant, or let his right or title, and if he had done it, it should have been void. Then this statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before, namely, that a man shall forfeit the value of the thing bargained or promised, &c., and to avoid such bargains or promises where a man is out of possession, is the only point which the statute here remedies.'" All dealings with rights of entry, except by release to the person in possession, were, therefore, previously to the statute of 8 & 9 Vict. dealings with "pretenced" rights and titles within the meaning of the Act of Hen. 8. But the Act of the Queen has enabled rights of entry to be conveyed, and since that Act a right or title, good in fact, that is, not fictitious, is not a "pretenced" title within the statute, simply because it is a right of entry. In the present case there is no ground for saying that the title which the defendant purported to convey was fictitious. It was a title existing in fact. It was, however, a right of entry,

(1) 1 C. B. 724.

1882

JENKINS v. JONES.

of which a sale before the Act of 8 & 9 Vict. would have been a dealing with a "pretenced" title, one that at common law could not be conveyed. This has been altered by the last-mentioned statute, and although in our opinion it is incorrect to say that 8 & 9 Vict. c. 106, has repealed the 2nd section of the Act of Hen. 8, it has this effect, that the deed of July, 1877, cannot be considered as a dealing with a "pretenced" right or title within the meaning of that Act. We are of opinion, therefore, that the deed of July, 1877, is not rendered void by the Act of Hen. 8, and that the plaintiff is entitled to judgment.

A question was raised as to the amount of damages, which the plaintiff is entitled to recover. The defendant had been bankrupt before the time when the fourth of the estate became vested in him and before the date of the deed of 1877, and the trustees in bankruptcy were therefore entitled to and have claimed the one-fourth of the estate which the defendant conveyed to the plaintiff. That which the plaintiff lost by the breach of the covenant was the one-fourth of the estate. It has been agreed that the value of this is 500*l.*, and this, in our opinion, the plaintiff is entitled to recover.

Judgment for the plaintiff.

Solicitor for plaintiff: *James B. Barrett, for Griffith Jones, Aberystwyth.*

Solicitors for defendant: *Jones, Blaxland, & Son, for Hugh Hughes & Sons, Aberystwyth.*

J. E. H.

PENWARDEN *v.* ROBERTS; SOLOMON, CLAIMANT.
WILSON & Co. *v.* ROBERTS; SOLOMON, CLAIMANT.
HEATH *v.* ROBERTS; SOLOMON, CLAIMANT.

1882
March 15.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 1—*Attestation by Solicitor of Grantee.*

The execution by the grantor of a bill of sale attested and registered under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31, s. 10), may be attested by the solicitor of the grantee.

APPEAL from the Alton County Court.

The plaintiffs having recovered judgments against the defendant, issued execution and his goods were seized thereunder. The claimant, as holder of a bill of sale, registered under 41 & 42 Vict. c. 31, s. 10, claimed the goods and, an interpleader summons having issued, at the hearing it appeared that the bill of sale was attested by the solicitor to the grantee alone, the grantor not having had independent advice. On this ground (inter alia) the county court judge barred the claim.

A rule having been obtained calling on the plaintiffs, the execution creditors, to shew cause why the decision of the county court judge should not be set aside and judgment entered for the claimant on the ground that the Bills of Sale Act, 1878, did not prohibit the solicitor to the grantee from attesting the bill of sale,

Stephen Lynch shewed cause. The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, sub-s. 1, provides that the "execution of every bill of sale shall be attested by a solicitor of the Supreme Court." The attesting witness in the present case is such a solicitor. Therefore the mere words of the Act are complied with. But the spirit of it is to prevent frauds on the grantor, and that the attesting witness shall be an independent person. So where the grantee of a bill of sale, who was himself a solicitor and therefore within the strict words of s. 10, sub-s. 1, attested the

1882

PENWARDEN v. ROBERTS.

WILSON v. SAME.

HEATH v. SAME.

execution of the instrument, it was held to be invalid: *Seal* v. *Claridge* (1); Lord Selborne, C., saying that under the Bills of Sale Act "it is necessary that the execution of a bill of sale shall be attested by a solicitor. This means that a solicitor shall be an independent witness." *Hill* v. *Kirkwood* (2) is no decision to the contrary.

Ringwood, for the claimant, in support of the rule. The point raised has not been expressly decided, but the authorities are in favour of the validity of the attestation. The Act has been satisfied. *Seal* v. *Claridge* (1) was decided on the principle that a party to an instrument cannot attest it. In *Hill* v. *Kirkwood* (2) Cotton, L.J., expressed a distinct opinion that a bill of sale might be attested by the solicitor of the grantee.

[*Davis* v. *Goodman* (3), *Vernon* v. *Cooke* (4), were also cited.]

FIELD, J. There is no authority exactly in point. In *Seal* v. *Claridge* (1) my Brother Huddleston gave judgment against a bill of sale holder on the ground that the grantee, although a solicitor, could not be an attesting witness, and that decision was upheld in the Court of Appeal. It was there said that the Act requires an attesting witness, and that s. 10 providing that a solicitor shall attest the bill of sale means some third person and not one of the parties to it. Here the attesting witness is such a third person, and so that authority is clearly distinguishable. It is true that Lord Selborne, C., in his judgment suggested that the solicitor must be an independent witness. But in *Hill* v. *Kirkwood* (5) Cotton, L.J., said that the Court could not add to the Act of Parliament by requiring the solicitor to be a practising solicitor, or by requiring that he should be one who is not in any way connected with the grantee. We have come to the same conclusion; we think that there are no words in the Act requiring the solicitor to be an independent witness, and that the attestation of the bill of sale is valid, and our judgment in the three cases,

(1) 7 Q. B. D. 516, p. 519.
(2) 28 W. R. 358; 42 L. T. 105.
(3) 5 C. P. D. 128.
(4) 49 L. J. (C. L.) 767.
(5) 28 W. R. 358, p. 360; 42 L. T. 105, p. 108.

1882

PENWARDEN v. ROBERTS.

WILSON v. SAME.

HEATH v. SAME.

therefore, is that the execution-creditors do withdraw from possession and pay the costs.

BOWEN, J. I am of the same opinion.

Rules absolute.

Solicitors for execution-creditors: *Adams, Moberly, & Shenton, Winchester.*

Solicitor for claimant: *A. S. Jonas.*

J. R.

[IN THE COURT OF APPEAL.]

May 26.

FORD *v.* KETTLE.

Bill of Sale—Registration—Affidavit of Execution and Attestation—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.

The affidavit which is filed on the registration of a bill of sale must shew that the solicitor whose name appears as the attesting witness to the deed did in fact attest it, i.e., was present when it was executed by the grantor.

The affidavit is not sufficient if it only verifies the signature of the solicitor to the attestation clause.

Sharpe v. *Birch* (8 Q. B. D. 111) followed.

ON the 19th of December, 1881, W. H. Hooper executed a bill of sale of his stock-in-trade, furniture, and other chattels, to Richard Ford to secure the sum of 422*l.* and further advances. The execution of the deed by Hooper was attested by two witnesses, one of whom was A. C. Burbidge, a solicitor of the Supreme Court, and the other was J. G. Symonds, a solicitor's clerk. The attestation clause, as regarded Burbidge, stated that the deed had been "signed, sealed, and delivered by Hooper in my presence, the effect hereof having been first explained to him by me." The deed was registered in the Queen's Bench Division on the 20th of December, 1881. The affidavit then filed with a copy of the deed was made by Symonds, who deposed as follows: "The paper writings hereunto annexed are a true copy of a bill of sale and of every schedule or inventory thereunto annexed or therein referred to and of every attestation of the execution of such bill of sale. I was present and saw W. H. Hooper in the

1882

FORD v. KETTLE.

said bill of sale named, who resides at No. 66, Broad Street, Portsmouth, and carries on business at Nos. 50 and 66, Broad Street, Portsmouth, and is an optician, execute the said bill of sale, and the same was made originally by him on the 19th of December, 1881. The names or signatures 'A. C. Burbidge' and 'J. G. Symonds,' subscribed as the attesting witnesses to the said bill of sale, are respectively in the proper handwritings of the said A. C. Burbidge and of me, this deponent; and I say that the said A. C. Burbidge is a solicitor of the Supreme Court of Judicature in England. Before the execution of the said bill of sale the effect thereof was explained to the said W. H. Hooper by the said A. C. Burbidge."

On the 4th of January, 1882, the goods comprised in the bill of sale were seized under a writ of fi. fa. issued by Kettle and others on a judgment which they had recovered against Hooper. Ford claimed the goods by virtue of the bill of sale; and the sheriff issued an interpleader summons. An interpleader issue was directed to be tried, in which Ford was plaintiff and Kettle and others were defendants. The issue was tried on the 18th of April, 1882, before Field, J., who, on the authority of *Sharpe* v. *Birch* (1), directed the jury that the affidavit of Symonds was not sufficient under s. 10 of the Bills of Sale Act, 1878, and that the registration was therefore invalid. A verdict was accordingly found for the defendants. The plaintiff moved for a rule for a new trial on the ground of misdirection by the judge.

The Divisional Court (Grove and Lopes, JJ.) refused the application, being of opinion that they were bound by the decision in *Sharpe* v. *Birch*. (1)

The plaintiff appealed.

The Court of Appeal (Jessel, M.R., and Brett and Cotton, L.JJ.) granted a rule nisi to be argued in the Court of Appeal.

May 25. *Herbert Reed* (*A. Charles, Q.C.*, with him), for the execution creditors, shewed cause against the rule. The affidavit is insufficient. It does not say that the solicitor attested the execution of the deed, or that he was present when it was executed.

(1) 8 Q. B. D. 111.

1882

FORD v. KETTLE.

Sect. 10 of the Act (1) requires that the affidavit shall shew that the deed was duly attested, i.e., as s. 8 says, "duly attested under this Act." Sects. 8 and 10 are to be read together: *Davis* v. *Goodman*. (2) "Due attestation" is attestation in the particular mode prescribed by the Act. The provisions of the Act must be strictly complied with; otherwise the registration is void. If in fact the solicitor was not present when the deed was executed by the grantor, the deponent could not be indicted for perjury.

Crump, and *J. E. Bankes*, for the grantee. The affidavit is made by one of the attesting witnesses, and it really, on a fair construction of the words, shews that the solicitor attested the execution.

[JESSEL, M.R. In *Blake* v. *Blake* (3) we assumed that "attestation" implies the presence of the attesting witness.]

The affidavit is only dealing with what happened on one particular day, and the deponent says in effect that he was present at the execution, and heard the solicitor explain the effect of the deed to the grantor before he executed it.

(1) Sect. 8 provides that "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act within seven days after the making or giving thereof," otherwise it shall be void as against trustees in bankruptcy or execution creditors of the grantor unless apparent possession of the goods is taken by the grantee.

By s. 10, "A bill of sale shall be attested and registered under this Act in the following manner:

"(1.) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:

"(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed, with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."

(2) 5 C. P. D. 128.

(3) 7 P. D. 102.

1882

FORD v. KETTLE.

[JESSEL, M.R. He does not say he saw the solicitor write his name after the grantor had written his.

LINDLEY, L.J. He does not say he saw the solicitor attest the execution.

JESSEL, M.R. Or that he did attest it.]

The Act does not require that the solicitor should explain the effect of the deed to the grantor, but only that the attestation clause shall state that he did so: *Ex parte National Mercantile Bank.* (1) The legislature thought that the statement of a solicitor, who is an officer of the Court, might be accepted. So in the present case, there is the statement in the attestation clause that the solicitor did attest, and the only thing necessary to be verified is that the signature to that statement is the signature of the solicitor. The signature is verified by the affidavit, and that is sufficient. Suppose the solicitor had been the only attesting witness (and only one is required by the Act), he might have died before the expiration of the seven days allowed for registration. The affidavit ought to be construed liberally, and, independently of the Act, it would be accepted on the trial of an action as sufficient evidence that the solicitor did attest the execution. It would be inconsistent with the fair meaning of the affidavit that the solicitor was not present at the time of execution. In *Sharpe* v. *Birch* (2) there was only one attesting witness, and the affidavit was made by another person.

JESSEL, M.R. I think I may without impropriety say that I much regret the conclusion at which I feel myself compelled to arrive. I am always exceedingly loth to allow a purely technical objection to prevail. Here the objection which is taken is a purely technical one; the affidavit has two or three words omitted from it. At the same time a judge must not allow hard cases to make bad law. When we have, as in this case, an Act which was intended to be very strict in its provisions, and we find that, on a fair interpretation of the words, a condition which is imposed for insuring the validity of the execution has not been complied with, we are not at liberty to depart from the meaning of the Act. Now s. 8 of the Act requires that every bill of sale shall

(1) 15 Ch. D. 42. (2) 8 Q. B. D. 111.

1882

FORD v. KETTLE.

be "duly attested, and shall be registered under this Act," otherwise it shall be deemed fraudulent and void as against a trustee in bankruptcy and an execution creditor of the grantor. No form of attestation is given in the Act, but the substance of the attestation is given in s. 10, which provides that "the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." Sect. 10 also provides that the bill of sale, and a true copy of it, and of every attestation of its execution, "together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation" shall be presented to, and the copy and affidavit shall be filed with the registrar. The registrar has no option in the matter, he must take the copy of the bill of sale and the affidavit as they are presented to him, and must file them. This is the registration itself, not a mere preliminary to it. The question is whether the affidavit which has been filed in the present case is in compliance with the Act. The Act says it is to be an affidavit of the "due execution and attestation" of the bill of sale. I do not think it much matters whether the word "due" is there or not, for no mode of execution is pointed out. The word "due" cannot, therefore, affect the meaning of the word "execution," and it follows that it cannot affect that of the word "attestation." I think we may, therefore, throw the word "due" out of consideration in construing the clause. What then does "attestation" mean? It is a well known legal term. The ordinary form of attestation is "signed, sealed, and delivered" by the person who executes in the presence of the attesting witness. That is what "attestation" means. The thing must be done in the presence of the man who in the future will be able to testify that it was done. The authorities shew that there is no attestation unless the thing is done in the presence of the attesting witness. Does the affidavit in the present case satisfy this test? Does it shew that the solicitor who is the attesting witness was present when the grantor executed the deed? Clearly it does not. It says that the signature which purports to be his is in his proper handwriting, but it is quite consistent with this that he may have

1882

FORD v. KETTLE.

come into the room half an hour after the grantor executed the deed. It is not sufficient that the attestation clause should state that the solicitor did attest the execution of the deed; the Act requires an affidavit of the attestation, and here there is no affidavit that the solicitor attested the execution of the deed, or that he was present when it was executed, or anything equivalent to this. I quite agree with Mr. Crump that if at the trial of an action such an affidavit by a solicitor was tendered as evidence of the execution of a deed it could not be objected to, and we should infer that no solicitor would have the courage to make such an affidavit if he had not been present when the deed was executed. But that only comes to this, that, if there was no Act of Parliament on the subject, you might infer that that was done which the affidavit does not say was done. I feel the force of Mr. Reed's argument, that you could not indict a man for perjury because you chose to draw a wrong inference from what he said. If the Act requires a certain safeguard for the protection of creditors of the grantor, and no doubt it is a safeguard, we cannot dispense with it. It appears to me, though I confess I come to the conclusion reluctantly, that the affidavit in the present case was insufficient. Consequently the registration was invalid, and the rule must be discharged.

LINDLEY, L.J. I am of the same opinion. We must see what it is which the Act requires to be done. Sect. 8 says that every bill of sale shall be duly attested and registered under the Act, and s. 10 explains what is meant by the registration which is referred to in s. 8. As I understand it, registration means the presenting to the registrar of the original bill of sale and the filing with him of a copy of it and a certain affidavit. If this is not done, the bill of sale is not registered. What is the affidavit which is required by the Act? It is an affidavit of the due execution and attestation of the bill of sale. What is an affidavit of the attestation? I agree that the word "due" may be left out. What is attestation? The being present when a thing is done and seeing it done, so as to be able to give testimony that it was done. The presence of the attesting witness is essential. The affidavit must be worded in such a way as to shew that the

person who attests the execution was present when the execution took place. The affidavit in the present case does not shew this, and we cannot strain the words of the Act. This is a highly technical objection, but we must follow the words of the Act.

1882

FORD v. KETTLE.

Rule discharged.

Solicitor for execution creditors: *F. R. Wright.*
Solicitors for grantee: *Ford & Ford.*

W. L. C.

THE WARRINGTON WATERWORKS COMPANY *v.* LONGSHAW.

May 26.

Waterworks Company—Water Rate to be calculated on "Rateable Value"—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *s.* 68.

By the special Act of a water company, which incorporated the Waterworks Clauses Act, 1847, save so far as the clauses or provisions thereof were expressly varied or excepted, the company were obliged to supply water to the occupiers of dwelling houses for domestic purposes at a rate not exceeding 6*l.* per cent. per annum upon the "annual rack rent or value" of the premises supplied. It was further provided in a subsequent section of the Act that the rate should be "payable according to the annual value at which the premises were from time to time assessed to the poor-rate if the same were so assessed, or if not, according to the net annual value of the premises."

By the 68th section of the Waterworks Clauses Act, 1847, "the water rates, except as hereinafter and in the special Act mentioned, shall be payable according to the annual value of the tenement supplied with water":—

Held, that the water rate charged by the company must be calculated on the "rateable value" not on the "gross estimated rental" of the premises supplied with water.

CASE stated on appeal from the county court of Lancashire, holden at Wigan, of which the facts were in substance as follows:—

The action was brought by the plaintiffs to recover from the defendant a sum of 6*s.* in respect of a water rate for the half year ending the 24th of December, 1881.

The defendant paid into court the sum of 4*s.* 10*d.*, with costs proportionate to that sum, which the plaintiffs refused to receive in satisfaction. The defendant was the owner of a dwelling house supplied with water by the plaintiffs, and the "gross estimated rental" of such house in the poor-rate valuation was 10*l.*, and the "rateable value" 8*l.* The sole question in dispute between the

1882

WARRINGTON WATERWORKS COMPANY v. LONGSHAW.

parties was whether the plaintiffs were compelled under their Acts to calculate the water rate on the sum appearing in the column headed "rateable value" in the assessment to the poor's-rate of the defendant's premises, or whether they were entitled to calculate such water rate upon the sum appearing in the column headed "gross estimated rental" in such assessment to the poor's-rate.

By the company's special Act, 9 & 10 Vict. c. cxii. s. 53, it was enacted that the company should at the request of the owner or occupier furnish to every occupier of a private dwelling house, &c., a sufficient supply of water for the domestic uses of every such occupier at a rate not exceeding 6*l.* per centum per annum upon the annual rack rent or value of the premises so supplied with water. By the 54th section of the same Act it was enacted that such water rates should be payable according to the annual value at which the premises should be assessed to the poor's-rate, if the same should be assessed, or if not, according to the net annual value of the premises.

By the company's special Act, 18 & 19 Vict. c. xciii. s. 3, the Waterworks Clauses Act, 1847, save so far as the clauses or provisions thereof were expressly varied or excepted by the Act, was incorporated with the Act. By the 7th section the 9 & 10 Vict. c. cxii. was repealed. By the 63rd section it was enacted that the company should, at the request of the owner or occupier, furnish to every occupier of a private dwelling house, &c., a sufficient supply of water for the domestic purposes of such occupier, including water-closets, at a rate not exceeding 6*l.* per centum per annum upon the annual rack rent or value of the premises so supplied with water. By the 65th section it was provided that such water rates should be payable according to the annual value at which the premises were from time to time assessed to the poor's-rate, if the same were so assessed, or if not, according to the net annual value of the premises.

The judge decided in favour of the defendant, and that the plaintiffs were bound to calculate the water rate upon the "rateable value."

The question for the Court was whether the plaintiffs were entitled to calculate the water rate upon the "gross estimated rental," or whether they were compelled to calculate such water

rate on the "rateable value" appearing in the assessment of the poor's-rate on the defendant's premises.

March 11. *Webster, Q.C.* (*S. Taylor*, with him), for the plaintiffs. The section which provides that the water rate shall be payable according to the "annual value at which the premises are assessed to the poor-rate," must be read in connection with the previous section, which fixes the rate at a sum not exceeding 6*l.* per cent. upon the "annual rack rent or value of the premises." The "gross estimated rental" is the equivalent of the "annual rack rent or value." The premises may, without any great strain on the language, be said to be assessed to the poor-rate at the gross estimated rental or value, inasmuch as such gross rental or value forms the basis upon which, subject to certain statutory deductions, the premises are assessed to the poor-rate. The word "assess," does not necessarily mean "charge." It may mean merely "estimate," or "ascertain." Strictly speaking the premises are not charged by a poor-rate, but the occupier in respect of the premises. The words "annual value," and "net annual value," as used in the special Acts mean net annual value as between landlord and tenant, not net annual value for rating purposes or rateable value. The water rate must therefore be computed on the "gross estimated rental," not the "rateable value." The 68th section of the Waterworks Clauses Act, 1847, provides that the rate shall be payable according to the "annual value" of the tenement supplied. That Act is incorporated with the special Act, and it is clear that "annual value" there must mean the annual value before making the statutory deductions necessary to convert "gross estimated rental" into "rateable value."

[He cited *Sheffield Waterworks Co.* v. *Bennett.* (1)]

Sir Hardinge Giffard, Q.C. (*Aspland*, with him), for the defendant. (2)

Cur. adv. vult.

(1) Law Rep. 7 Ex. 409; Law Rep. 8 Ex. 196.

(2) At the close of the argument for the plaintiffs the Court intimated that their opinion was in favour of the defendant, but that they would not deliver judgment until after the argument of the case of *Dobbs* v. *Grand Junction Waterworks Co.*, *post*, 151, which involved a somewhat similar point. It was therefore arranged that the counsel for the defendant should not be called upon to argue unless after hearing the arguments in the latter case the Court thought it necessary. They therefore did not argue.

1882

WARRINGTON WATERWORKS COMPANY v. LONGSHAW.

May 26. The judgment of the Court (Field and Bowen, JJ.) was delivered by

FIELD, J. This is an action brought to recover a sum of 6*s.* for half a year's supply of water by the plaintiffs to the defendant in respect of a dwelling-house of which he is the owner. The defendant admitted his liability to the extent of 4*s.* 10*d.*, but disputed the rest. The plaintiffs claimed to recover the full sum under their special Acts. By the first of these (the Warrington Water Works Act of 1845, c. cxii., s. 53) the plaintiffs were obliged to furnish to every "occupier" of a dwelling-house water at a rate not exceeding 6*l.* per cent. per annum upon the "annual rack rent or value" of the premises, and such rate is by s. 54 to be payable "according to the annual value at which the premises shall be assessed to the poor-rate if the same shall be so assessed, or if not, according to the net annual value of the premises." By s. 61, "owners" of dwelling-houses "the annual rateable value" of which shall not exceed 10*l.*, and let upon periods not exceeding a month, are made liable to the water rate instead of the occupier.

By and with a subsequent Act (1855) the Act of 1845 was repealed, and the Waterworks Clauses Acts save "so far as the clauses or provisions thereof respectively are expressly varied or excepted," are incorporated. By s. 63 of this Act of 1855 the plaintiffs are obliged, as in the former Act, to furnish a supply of water at a rate not exceeding 6*l.* per cent. per annum upon the "annual rack rent or value," of the premises supplied, such water rate being by s. 65 made payable according to the "annual value at which the premises are from time to time assessed to the poor-rate, if the same be so assessed, or if not, according to the net annual value of the premises," this provision being in substance identical with that of the 54th section of the repealed Act. The words "annual value" thus used in these Acts are the same words that are used in the General Parochial Assessment Act, 5 & 6 Wm. 4, c. 97, by which the assessment of occupiers to the poor-rate is governed, and by which (as is well known) no poor-rate is of force which is not made upon "an estimate of the net annual value" of the hereditaments. In that Act the words "net annual value" are followed by an express definition of the

sense in which they are used, that is to say, it is to be the rent at which the hereditaments may reasonably be expected to be let "free of all usual tenant's rates and taxes, and tithe rent-charge and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

Under this Act, therefore, the sum at which the party chargeable to the poor-rate is to be assessed is arrived at by two steps, 1st, by ascertaining the rent without taking into account the rates and taxes and tithe rent-charge usually borne by the tenant, or in other words the sum which is ordinarily paid as "rent" to the landlord, and 2ndly, by deducting from that sum the expenses necessary to be incurred by the landlord in order to keep the rateable hereditaments in the necessary condition to command that rent. The sum arrived at by the first stage of this calculation is in the words of the heading of the form of rate given by the Act, and of the definition given in the Union Assessment Act of 1862, "gross estimated rental," the ultimate result being described as "rateable value," and that is the sum upon which the computation of the amount payable by the person chargeable is to be made.

This being the state of the law applicable to the subject, the following are the facts to which it has to be applied. The defendant is the owner within the meaning of the 65th section of the Act of 1855 of the dwelling-house to which the water was supplied, and by the poor rate at the time in force this dwelling-house was stated to have a "gross estimated rental of 10*l.*" and to be of the "rateable value of 8*l.*," and the defendant was "assessed" as "owner" upon the latter sum, and did not dispute his liability to that extent. The plaintiffs however claimed to compute his water rate upon the higher sum. At the hearing before the learned county court judge he held that the defendant's contention was correct, but stated the case for the opinion of the Court upon which we are now called on to decide.

Upon the arguments before us it was not disputed on the part of the plaintiffs that the sum upon which the computation had to be made was to be found in the poor rate, but it was said that the words decisive of the question as to the part of the poor rate in

1882

WARRINGTON WATERWORKS COMPANY v. LONGSHAW.

which that sum was to be found were the words "annual rack rent or value" in the earlier part of the 63rd section, and which "annual rack rent or value" they said was in truth the sum ordinarily going as rent into the pockets of the landlord, without making any deduction for what may be shortly called landlord's charges, or in other words the "gross estimated rental" of the poor rate.

In support of this contention Mr. Webster prayed in aid the 68th section of the Waterworks Clauses Consolidation Act of 1847 by which the water rates are to be payable according to the "annual value" of the tenements, alleging that it could not be reasonably held to be the intention of the legislature to point out one principle of assessment in the general Act and sanction a different principle in a private Act.

But the general Act is, as is well-known, of no binding force until it has been applied by some special Act, and inasmuch as in the present case the General Waterworks Act is only incorporated, save as its enactments are varied and altered by the special Act, the latter and its true interpretation must be had recourse to for the purpose of deciding the question now before us. Thus the contention is narrowed to the simple question whether by the special Act it is the "gross estimated rental" or "net annual value" of the hereditaments, that is to be taken as the basis of the water rate, and upon that question we think that the language of the Act now before us clearly points to the latter and not to the former, and that the legislature designedly intended to remove the question from the uncertainty of the words "annual rack rent or value" as used in the 63rd section and in the Waterworks Clauses Act of 1847, by declaring their meaning by the 65th section, for the 65th section says that the sum to be paid for water rate is to be calculated by a percentage upon the amount at which the premises are assessed to the poor-rate. It is true, as Mr. Webster pointed out, that the language is not technically accurate, for it is the occupier or owner and not the hereditament upon which the assessment is made, but surely the sum upon which he or the premises are assessed is not the "gross estimated rental." Before the ultimate assessment can be arrived at that sum must be reduced by deducting therefrom the land-

1882

WARRINGTON WATERWORKS COMPANY v. LONGSHAW.

lord's charges which leaves the "net annual value" as the basis of the rate. That therefore is the sum at which the owner or occupier is assessed to the poor-rate, and it seems to us to be the sum upon which his water rate is to be charged. Mr. Webster referred us to the case of the *Sheffield Waterworks Company* v. *Bennett* (1), but whatever light that case might have thrown upon a case in which the language, Act, and question had been precisely similar, it does not assist us in the present case where all differ.

We think therefore that the decision of the county court judge was correct, and affirm it with costs.

Appeal dismissed. (2)

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Co.*

Solicitors for defendant: *Field & Roscoe.*

E. L.

DOBBS, APPELLANT; THE GRAND JUNCTION WATERWORKS COMPANY, RESPONDENTS.

May 26.

Waterworks Company—Water Rate to be calculated on "Rateable Value."

A water company were by their special Acts compelled to supply water to occupiers of dwelling houses for domestic purposes at the following rates, viz., "where the 'annual value' of the dwelling-house should not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*, and where such 'annual value' should exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*"

It was also provided by their special Act (9 Geo. 4, c. cxl. s. 27), that the water-rate was to be payable "according to the actual amount of the rent of the premises where the same could be ascertained, and where the same could not be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate was computed."

In a case where there was no actual rent paid within the meaning of the Act, the occupier being lessee of the house for a long term at a ground rent:—

Held, that the water-rate must be computed on the "rateable value" of the premises supplied with water as appearing from the poor-rate assessment, not upon the "gross value."

CASE stated by a metropolitan police magistrate.

The facts were in substance as follows.

A dispute had arisen between the appellant and the respondents with regard to the amount of the water-rate payable by the

(1) Law Rep. 7 Ex. 409; Law Rep. 8 Ex. 196. (2) See next case.

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

former in respect of the after-mentioned premises. The appellant was the lessee, for a term of which about seventy years were unexpired, at a ground rent of 15*l.* a year, of a house in Westbourne Park in the parish of Paddington, which he occupied as a residence.

The rate in question was made upon the appellant by the respondents in respect of the water supply to the house for domestic purposes, and the amount of the rate was arrived at by a calculation of 4*l.* per cent upon the sum of 140*l.*, such sum being the gross annual value of the premises, as appearing in the valuation list for the time being in force under the Valuation Metropolis Act, 1869. The appellant claimed that the rate ought to be based upon the "rateable value" of the premises.

By the respondents' special Act, 7 Geo. 4, c. cxl. s. 27, it is provided that the company shall be obliged to furnish a sufficient supply of water to the house of every inhabitant occupying a private dwelling-house, &c., for the use of his or her own family at the following rate per annum, that is to say, where the rent of such dwelling-house shall not exceed 20*l.*, at a rate per cent. per annum not exceeding 7*l.* 10*s.*, and where such rent shall be above 20*l.* and not exceeding 40*l.* per annum at a rate per centum per annum not exceeding 7*l.*, and where such rent shall be above 40*l.* and not exceeding 60*l.* per annum at a rate per centum per annum not exceeding 6*l.* 10*s.*, and where such rent shall be above 60*l.* and not exceeding 80*l.* per annum at a rate per centum per annum not exceeding 6*l.*, and where such rent shall be above 80*l.* and not exceeding 100*l.* per annum at a rate per centum per annum not exceeding 5*l.* 10*s.*, and where such rent shall be above 100*l.* per annum at a rate per centum per annum not exceeding 5*l.*, and "every such rate shall be payable according to the actual amount of the rent, where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's-rate is computed in the parish or district where the house is situated." By the respondents' special Act, 15 & 16 Vict. c. clvii. s. 46, it is provided that the respondents shall, at the request of any owner or occupier of a house or other person entitled to a supply of water for domestic purposes, furnish to such owner or occupier or other

person a sufficient supply of water for domestic purposes at the rates hereinafter specified, that is to say, where the annual value of the dwelling or other place supplied shall not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*, and where such annual value shall exceed 200*l.* at a rate per centum per annum on such value not exceeding 3*l.* By s. 57 it is provided that except as by the Act expressly provided the Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions of the recited Acts or any of them (the 7 Geo. 4, c. cxl. being one of the recited Acts) in force at the commencement of this Act.

The magistrate held that the rate was chargeable upon the "gross value" as defined in the Valuation Metropolis Act, 1869, and therefore decided in favour of the respondents.

The question for the Court was whether the "gross value" (1) so defined was the proper basis of the water-rate to be charged by the respondents to the appellant or the "rateable value."

March 18. *Webster, Q.C.* (*Sutton*, with him), for the appellant. There is no actual rent in this case within the meaning of the Act, for it is clear that a mere ground-rent is not such a rent; therefore the water rate must be computed according to the annual value upon which the assessment to the poor-rate is computed. That is clearly the actual net value upon which the poor-rate is assessed, not the "gross value" or "gross estimated rental." At the time when the 7 Geo. 4, c. cxl., the company's special Act, was passed, the terms "gross estimated rental" and "gross value" were unknown to our legislation. It was not necessary before the Parochial Assessment Act that any such thing as gross estimated rental should be ascertained. (2)

C. Russell, Q.C. (*Sir F. Herschell, S.G.*, and *J. F. Clerk*, with

(1) The term "gross value" is substituted for "gross estimated rental" in the Valuation Metropolis Act, 1869.

(2) A portion of the argument that related to the question whether there had been a repeal by implication of the provision for computation of the water rate with reference to the poor law assessment (see the judgment) is omitted, as this question turned entirely on the construction of the particular local Acts, and it is conceived that the case is not of sufficient value as a precedent to be reportable on that point.

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

him), for the respondents. The water rate is by the Act to be computed according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate is computed. It is contended first, that "actual amount of rent" means not necessarily the amount actually paid to the landlord, but rack rent proper: *Sheffield Waterworks Co.* v. *Bennett.* (1) There is a means of ascertaining it in this case, for the "gross estimated rental" is the equivalent of it. Therefore, the case falls within the first alternative. Secondly, it is contended that the two alternatives must be equivalent. The meaning is that the rate is to be computed on the true "annual value," viz., the rack rent proper, where means exist for arriving at or ascertaining the same, or, if the same cannot be so ascertained, the gross estimated rental in the poor-rate is to be taken. The rateable value for poor-rate purposes is arrived at after deducting from the "gross estimated rental" or "gross value," which corresponds with the actual rent, certain expenses such as repairs and insurance. It would therefore create an inequality if in cases where houses were actually let and the rent could be ascertained the actual rent were taken as the basis of the water rate, and in cases where there was no rent to be ascertained the net rateable value were taken. This cannot have been intended. The poor-rate may, without any stretch of language, be said to be assessed upon the "gross value" or "gross estimated rental" as it forms the basis upon which the net rateable value is computed.

Webster, Q.C., in reply.

Cur. adv. vult.

May 26. The judgment of the Court (Field and Bowen, JJ.) was delivered by

FIELD, J. The question raised in this case (which was stated by Mr. Major Cook, one of the metropolitan police magistrates), was as to the principle upon which the respondents are entitled to charge the appellant for two quarters' supply of water to his dwelling house, and which charge was based by the respondents

(1) Law Rep. 7 Ex. 409; 8 Ex. 196.

upon an annual value of 140*l.*, the appellant's contention being that he was liable to be charged on no greater annual value than 118*l.* The 140*l.* was the "gross estimated rental" as the 118*l.* was the "net annual value" of the premises as stated in the poor-rate assessment of the appellant which was in force at the time of the supply.

The respondents claimed to be entitled to the greater sum by virtue of their special Acts.

By one of these, 7 Geo. 4, c. cxl. s. 27, the respondents were compelled to furnish a supply of water to inhabitants of private dwelling houses at certain "rates" per annum graduated upward from a rent not exceeding 20*l.* per annum to 100*l.* per annum, "and where the rent is above 100*l.* per annum, then at a rate per cent. per annum not exceeding 5*l.*" And s. 27 of the same Act provided that the "rate" was to be payable according to "the actual amount of the rent of the premises where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate is computed."

By a subsequent Act (15 & 16 Vict. c. clvii. by which the respondents had further powers conferred upon them), it is enacted (s. 46), that the company shall at the request of the owner or occupier of a house, or of any person who shall be entitled to demand a supply under that Act or any Act incorporated therewith, furnish such supply at the "rates" following, that is to say, "where the annual value of the dwelling house shall not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*, and where such annual value shall exceed 200*l.* at a rate per cent. per annum on such value not exceeding 3*l.*"

This section does not contain the closing words of the 27th section of the previous Act by which the mode of computing the "rate" is given, nor does this Act of 1852 repeal in express terms the prior Act or any part of it. On the contrary, the 57th section of the later Act enacts that, except as expressly provided, the Act or anything therein contained shall not repeal, alter, interpret, or in any manner affect any of the provisions of the Acts recited, of which the 7 Geo. 4 is one. The assessment to the poor-rate must, as is well known, be made according to the provisions of

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

the General Parochial Assessment Act (6 & 7 Wm. 4, c. 96), upon an estimate of the net annual value of the hereditaments, and such net annual value is defined as being the rent at which the same might reasonably be expected to let, "free of all usual tenant's rates and taxes and tithe rent-charge, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent." There are, therefore, two necessary steps to be taken in making the calculation in order to arrive at the sum upon which the poor-rate is to be computed. First, gross estimated rental; and, secondly, the residue of net rateable value.

In the present instance, however, the computation for the poor-rate is not made under the provisions of the General Assessment Act, but under those of the Metropolitan Assessment Act (32 & 33 Vict. c. 67), by which the rateable hereditaments subject to it are divided into different classes, with a percentage applicable to each class, for the purpose of making a fixed deduction by which gross estimated rental is reduced to net rateable value.

On the hearing of the present case before the magistrate, it was admitted that the appellant was the lessee of a term of which about seventy years were unexpired, at a ground rent of 15*l.* a year, of a house known as No. 34, Westbourne Park, which he occupied as his residence, and the lease of which contained covenants by him to repair and insure the premises, as well as the other usual covenants entered into by a tenant.

The amount of the water rate which the respondents sought to charge against the appellant was arrived at by a calculation of 4*l.* per cent. upon 140*l.*, the amount of the "gross estimated rental" appearing in the valuation list, and the appellant denied his liability to be charged upon any greater sum than 118*l.*, which appeared in the list as the "net rateable value," and the dispute thus existing between the parties was referred to the magistrate under the 68th section of the Waterworks Clauses Act of 1847.

Before the magistrate the appellant's contention was founded upon what he alleged to be the true construction of the 27th section of the Act 7 Geo. 4, c. cxl., but he was met in limine by

the contention of the respondents that the whole of that section was repealed by the 46th section of the subsequent Act, and that it was by that Act alone that the water rate was governed. This contention was supported by the magistrate, who also held upon the authority of *Sheffield Waterworks Company* v. *Bennett* (1), that the "gross estimated rental" of the valuation list, and not the "net rateable value" was the true representative of the "annual value" of the 46th section. But we are unable to agree in this conclusion, for we do not think that the 27th section of the former Act is repealed by the 46th section of the subsequent Act.

The first Act is expressly recited in the later one, and not only is there no express repeal of it, but instead of any express repeal there is the enactment (s. 57) which we have already adverted to. This, however, would not be enough to enable us to decide the question, for although there is no express repeal that effect would have been produced, according to the ordinary rules of construction of statutes, if the enactments of the 46th section of the later Act cannot be construed so as to be consistent with the continuance of the earlier enactments in s. 27, for in that case the inconsistent subsequent affirmative enactment would import a negative fatal to the earlier one.

Now it is clear beyond doubt (as was admitted by Mr. Webster, who argued the case for the appellant), that so much of the 27th section as graduates the amount of the percentage according to the rent of the dwelling-house in stages or leaps from 20*l.* up to 100*l.*, and puts it at 5*l.* per cent. upon all above is inconsistent with the subsequent enactment which gives a uniform charge of not exceeding 4*l.* per cent. up to 200*l.*, and of not exceeding 3*l.* per cent. on all rent above, and that so much therefore of the 27th section is by implication repealed. But he said that this inconsistency between the enactments goes no further, and that there is no inconsistency in adopting the latter percentages and applying to them the mode of computation provided by s. 27 of the sum upon which the rate of 4*l.* or 3*l.* per cent. as the case may be is payable, and in this contention we agree with him.

It seems to us that if from s. 27 the graduated scale of rates

(1) Law Rep. 7 Ex. 409.

1882

DOBES v. GRAND JUNCTION WATERWORKS COMPANY.

jumping by successive steps is eliminated, and the more simple and general one of starting with 200*l.* a year and diminishing the rate for all above is substituted, the whole of the rest of the 27th section may well stand together with the 46th.

Repeal by implication is never to be favoured; it is no doubt the necessary consequence of inconsistent legislation whenever it occurs, but which must not be imputed to the legislature unless absolutely necessary. We think, therefore, that the enactment of the 27th section defining the mode by which to arrive at the sum upon which the percentage is to be calculated is in force, and therefore the next question is, whether in the case now before us the "actual amount of the rent can be ascertained." What, then, is the meaning of the "actual" amount of rent? It must, we think, mean some actual amount which has been bonâ fide arrived at by contract between the landlord and tenant (where such a contract exists) as the sum payable to the landlord by way of rent for the hereditament which is the subject of the letting. But in the case now before us no such contract exists, nor has any such actual amount been in any way arrived at, for the hereditament is in the occupation of its owner.

It is true that he pays a rental to his landlord of a small sum, but that is, as it is called, a "ground," not a rack or other rent, for the demised hereditament, and Mr. Webster could not and did not contend that the tenant was entitled to have his water supplied upon the footing of that rent.

But Mr. Russell said that "the actual amount of rent" could, nevertheless, be ascertained in the present case, for he said it is to be found in the amount of the "gross estimated rental" of the valuation list, which, applying to this case the principle which he said was at the base of *Sheffield Waterworks Co.* v. *Bennett* (1), was the equivalent of "rent," or its equivalent "annual value." In that case "rent" and "annual" were the only words to be construed. There was neither "actual amount of rent" or reference to poor law, and the Court not, however, without considerable doubt and hesitation, held that where a landlord takes upon himself voluntarily to pay, or is under a statutory obligation to pay, charges not in themselves in the nature of rent, in considera-

(1) Law Rep. 7 Ex. 409; Law Rep. 8 Ex. 196.

tion of a larger sum than rent strictly speaking, the owning consumer is entitled to discard every part of the sum so paid which is not rent, and to have his supply based upon that which is actually rent. No doubt also if the principle is applied to a converse case in which a tenant pays a less sum by way of what is called rent, on account of his undertaking to bear part of the landlord's necessary expenses in keeping the rateable hereditaments in a state to command the rent, it might be urged that the amount paid in money as for rent should be increased by the annual amount of the obligation so incurred, so as to bring the water charge to the "gross estimated rental," and that as we understand it was the contention of Mr. Russell, who was able to point out some apparently startling inconsistencies which occur upon any other view. But, however that might be in any case where the question shall arise, it is not necessary for us to decide that question in the present, for we think that the legislature, in using the words it has in the 27th section, intended to free the question from all these difficulties, and that it intentionally created, as the standard of charge, either the actual rent, where ascertained or, in the alternative, the poor rate assessment, and if the first words are to be read as compelling the person supplying and supplied to go to the poor law assessment to find out the basis of computation, the latter words have no meaning, and so no alternative is given.

This being so the question in the present case is reduced (allowing for a very slight variation in words) to the question which we have just had to consider in the *Warrington Case* (1), and we give it the same answer and for the same reasons.

In arriving at this conclusion we do not shut our eyes to the possibility that the application to the sale of water of a standard adopted for and adapted to a totally different purpose may in some instances produce results not altogether consistent with that uniformity or equality of price, which in ordinary commercial transactions would be found, but we think that the legislature intended to apply to the charge for the supply of so universally necessary an article as water by a privileged body an already ascertained standard easily to be referred to, and upon which the

(1) Ante, p. 145.

1882

DOBBS v. GRAND JUNCTION WATERWORKS COMPANY.

company and consumer could alike act, and that that standard is to be found either in a bonâ fide contract for rent reduced to its true elements where that exists or in "net rateable value" which is the actual basis of chargeability, rather than in gross estimated rental which is only a step in the calculation.

For these reasons we have come to the conclusion that the magistrate's order cannot be supported, and the order we make is that the annual value of the appellant's dwelling-house is to be taken at 118*l.*, the sum upon which the assessment to the poor-rate is computed, and we allow the appeal with costs.

Appeal allowed.

Solicitors for appellant: *Hollingsworth, Tyerman, & Andrewes.*
Solicitors for respondents: *Bircham & Co.*

E. L.

June 20.

HETHERINGTON *v.* THE NORTH EASTERN RAILWAY COMPANY.

Lord Campbell's Act (9 & 10 *Vict. c.* 93), *s.* 2—*Action for causing Death through Negligence—Pecuniary Loss to surviving Relative, Evidence of.*

In an action brought, under 9 & 10 Vict. c. 93, for the benefit of the father of the deceased, evidence was given that the father who was fifty-nine years of age was nearly blind and injured in his leg and hands, and was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since:—

Held, that there was evidence for the jury of pecuniary injury to the father from the son's death.

ACTION under 9 & 10 Vict. c. 93 (Lord Campbell's Act) for causing the death of a person through negligence, brought by the plaintiff, as personal representative of the deceased, against the company for the benefit of the plaintiff, the father of the deceased.

The action was brought in the county court of Northumberland under the provisions of the Employers' Liability Act, 1880, the deceased being a servant of the company. At the trial, which took place before a jury, the plaintiff gave evidence as follows:—

1882

HETHERINGTON v. NORTH EASTERN RAILWAY CO.

"The deceased was my son. He was twenty-nine years old. He gave me a portion of his earnings when I wanted it. I am nearly blind and injured in my leg and hands. My son used to contribute to my support. I work when I can. I am not so able to work as I used to be. I am fifty-nine. My son was not married." Cross-examined: "Five or six years ago I was out of work for six months and my son was very kind to me and helped me." Re-examined: "He was always kind to me. I have never had money from him since." Upon this evidence the county court judge ruled that there was no sufficient evidence of pecuniary injury occasioned to the father by his son's death to sustain the action, and nonsuited the plaintiff. A rule nisi had been obtained for a new trial on the ground of misdirection, against which

Gainsford Bruce shewed cause. It is clear that there must be evidence of pecuniary injury to support the action. A reasonable probability must be shewn of advantage to the relation for whose benefit the action is brought from the life of the deceased: *Franklin* v. *South Eastern Ry. Co.* (1): *Pym* v. *Great Northern Ry. Co.* (2); *Sykes* v. *North Eastern Ry. Co.* (3) There was no reasonable evidence of pecuniary loss occasioned to the father by the son's death to go to the jury. It was admitted by the father that his son was not contributing to his support at the time of his death, and had not in fact assisted him for five or six years. The mere relation of parent and child cannot give rise to the presumption that the child will give pecuniary assistance to the parent, and from the fact that five years before the son assisted his father pecuniarily no reasonable inference arises with regard to the probability of his doing so again. The Act contemplates some more substantial evidence of an actual pecuniary interest than the mere probability that a son may assist his father pecuniarily.

Steavenson, in support of the rule, was not called upon.

FIELD, J. In this case the action is brought for the benefit of the parent, one of the relations for whose benefit the statute allows

(1) 3 H. & N. 211. (2) 4 B. & S. 396.
(3) 44 L. J. (C.P.) 191.

1882

HETHERINGTON v. NORTH EASTERN RAILWAY CO.

the action to be brought. I have always understood the rule laid down by the decisions in such cases to be that there must have been a reasonable expectation of pecuniary advantage to the relation from the life of the deceased. The defendants' counsel alleges that there is no evidence of any such reasonable expectation in this case. I cannot come to that conclusion. It is not for me to say what as a juryman I should find on such evidence. The arguments that the defendants' counsel used would be very proper arguments to be urged upon the jury. I cannot, however, help thinking there was some evidence for the jury, and therefore this rule must be made absolute.

CAVE, J. I am of the same opinion. I think there was some evidence for the consideration of the jury, and that it was for them to say whether on that evidence there was a reasonable expectation of pecuniary advantage to the father from his son's life, and what, if so, the measure of such expectation was.

Rule absolute.

Solicitor for plaintiff: *Elgood.*

Solicitors for defendants: *Williamson & Hill, agents for Richardson & Gutch.*

E. L.

March 31.

PEARCE *v.* SCOTCHER.

Fishery—River in part navigable; but non-tidal.

There can be no public right of fishing in non-tidal waters, even where they are to some extent "navigable rivers."

CASE stated by justices for Denbigh under 20 & 21 Vict. c. 43.

1. On the 3rd of December, 1881, a complaint was heard at the petty sessional court house at Ruabon, in the county of Denbigh, upon an information preferred by a river watcher against the defendant, charging that he, on the 13th of October, 1880, at the parish of Ruabon, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, to wit, about the hour of 4 o'clock in the afternoon of the same day, unlawfully and wilfully did attempt to take certain

fish called salmon, then being found in a stream of water there known as the river Dee, wherein Arthur Mostyn Owen and others there had a private right of fishery, and not running through or being on any land adjoining or belonging to the dwelling-house of any person being the owner of the said water or having a right of fishery therein; contrary to the statute, &c. The justices dismissed the information. It appeared that the river Dee and its tributaries are constituted a salmon fishery district under the Salmon Fishery Acts, 1861 to 1873; and the conservators of such district exercise the right to grant licenses to fish "for salmon in any waters within the said district in which the holder of such licence is otherwise entitled to fish by law:" and the respondent, Scotcher, at the time mentioned in the information as the date when the alleged offence was committed, held one of such licenses.

4. The Dee for many miles above its estuary is tidal and navigable; but several miles beyond the flow of the tide, and about four miles below the place mentioned in the information, the river is crossed by Eibistock Weir, beyond which barges or boats proceeding up the river cannot pass.

5. The river above Eibistock Weir (including the place mentioned in the information) is not tidal nor capable of being navigated except by small pleasure boats or fishing boats called corracles, or barges carrying very light weights; but none of these can pass down over the Eibistock Weir, unless on high floods, during which they may pass over.

5. A. For the purposes of this case, but not otherwise, it was to be taken as a fact admitted by both parties that the river Dee at the place where the respondent fished is a public navigable river and highway for the public to pass and repass in corracles and such light craft as are suitable for such navigation.

6. The land upon each side of the river where the act of the respondent complained of took place belongs to one proprietor, Mr. James Ormerod, who on the 18th of April, 1879, executed a lease or grant under seal of all the fishery and right of fishing of and in the waters of the river Dee co-extensive with the estate of the grantor, unto Arthur Mostyn Owen and two others, their executors, &c., for one year, and afterwards from year to year, determinable by either party giving to the other six calendar

1882

PEARCE v. SCOTCHER.

months' notice to quit, at the annual rent of 1*s*. This grant embraces the spot called Craigpool, where the act complained of was committed by the respondent.

7. There are ancient bridges and ferries above and below Craigpool across the river.

8. The public generally have hitherto during the whole period of living witnesses, and for considerably more than forty years, exercised the assumed right of fishing in the river at the spot in question and other places above and below it from corracles and from the banks, without any express permission from any one, and until recent years have not been interfered with for so doing.

9. The respondent resides some miles from the river, and has no land or property adjacent or near to it: and he committed the act mentioned in the information, alleging that with his fishing-licence he had a right to do so, without any other licence or permission whatever.

10. It was contended on the part of the respondent that the fishing at this place belonged to the public, or that it had been enjoyed by the public as of right without interruption for so many years that it could not now be taken away; that the river was navigable by the public, and the public were entitled to cross the river by ferry; that the right of fishery also belonged to the public; that the licence granted by the Dee Salmon Fishery conservators authorized the respondent to fish in this part of the river; that he therefore claimed as a matter of public right to fish there; and that on these grounds the justices ought to dismiss the case.

11. It was contended on the part of the appellant that, as the Dee at this spot is not a tidal river, the right of fishery necessarily belonged to the owner of land over which the river ran, and that any laches in not interfering with strangers fishing there did not take away his right, nor give it to the public; that, as the fishery was let by deed to the lessees, who had not given permission to the respondent, the latter had not shewn any right to fish there, and such a right of fishery claimed for the public generally without any facts to justify a presumption of a grant or prescription as appurtenant to land could not be supported in law; and, further,

1882

PEARCE v. SCOTCHER.

that the licence from the Dee Salmon Fishery conservators could give no right whatever to fish in private water, but was merely a tax like a game-licence imposed on those who fished, and for supplying funds to enable the board to protect the fisheries; and that therefore the respondent shewed no defence or claim of right, and ought to be convicted.

The question for the opinion of the Court was, whether, on the above facts, the justices ought to have convicted the respondent.

H. Matthews, Q.C. (*J. Paterson*, with him), for the appellant. There is no right in the public to fish in the river Dee at the spot in question. The distinction is between tidal rivers and rivers non-tidal. In the former the soil is in the Crown, and the public have the right to fish there; but, in the latter, the soil is in the riparian proprietors on either side, and a right to fish cannot be claimed by the public. The Dee at the spot in question, though in a certain sense navigable, is not a tidal river. The law is thus laid down in Hale, de Jure Maris, ch. 1, p. 1:—"Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing, usque filum aquæ; and the owners of the other side the right of soil or ownership and fishing unto the filum aquæ on their side; and, if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." The like law is laid down in the case of *The Banne.* (1) The right to the soil of the Dee at the spot in question is in the owners of the land on either side. A right to take fish in the soil of another is a profit à prendre, and cannot be acquired by custom: *Bland* v. *Lipscombe.* (2) In *Murphy* v. *Ryan* (3) it was held that the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow; and that the word "navigable," used in a legal sense as applied to a river in which

(1) Davis, 55, 56.

(2) Note to *Race* v. *Ward*, 4 E. & B. 713; 24 L. J. (Q.B.) 155, n.

(3) 2 Ir. C. L. Rep. 143.

1882

PEARCE v. SCOTCHER.

the soil primâ facie belongs to the Crown and the fishing to the public, imports that the river is one in which the tide ebbs and flows. And see Com. Dig. *Navigation* (A.), (B.), citing *Bulstrode* v. *Hall.* (1) Willes, J., delivering the opinion of the judges in *Malcolmson* v. *O'Dea* (2), says: "The soil of all navigable rivers, like the Shannon, so far as the tide flows and reflows, is primâ facie in the Crown, and the right of fishing primâ facie in the public."

[*Hudson* v. *Macrae* (3) and *Hargreaves* v. *Diddams* (4) were also cited.]

M'Intyre, Q.C. (*Mackenzie,* with him), contra. It is found that the Dee at the spot in question is navigable, though to a limited extent only, consequently the soil is not in the adjoining owners, nor have they the exclusive right of fishing there. *Reg.* v. *Burrow* (5) is exactly in point.

[*Williams* v. *Wilcox* (6) and *Bristow* v. *Cormican* (7) were also cited.]

H. Matthews, Q.C., in reply. *Reg.* v. *Burrow* (5), which is referred to in *Hargreaves* v. *Diddams* (8), was not the case of a river at all, but of an inland lake. *Bristow* v. *Cormican* (7) was also the case of an inland lake. Lawson, J., in giving the judgment of Morris, C.J., Keogh, J., and himself, in the Exchequer Chamber (9), says: "The law on this subject is so clearly settled that it must be followed by every Court until it is altered by a decision of the House of Lords. The decisions of the Common Pleas in this country in *Murphy* v. *Ryan* (10) and of the Common Pleas and Exchequer Chamber in *Bloomfield* v. *Johnston* (11) establish that there can be no public right of fishing in non-tidal waters. The cases in England of *Hudson* v. *Macrae* (3) and *Hargreaves* v. *Diddams* (4) shew that such a right cannot in contemplation of law have any existence." *Bristow* v. *Cormi-*

(1) 1 Sid. 148.
(2) 10 H. L. Cas. 619.
(3) 4 B. & S. 585; 33 L. J. (M.C.) 65.
(4) Law Rep. 10 Q. B. 582.
(5) 34 J. P. 53.
(6) 8 Ad. & E. 333.
(7) 10 Ir. Rep. C. L. 398.
(8) Law Rep. 10 Q. B. 586.
(9) 10 Ir. Rep. C. L. 413.
(10) 2 Ir. C. L. Rep. 143.
(11) Ir. Rep. 8 C. L. 68.

can (1) came before the House of Lords, but there was no decision upon this point.

GROVE, J. I entertain no doubt in this case. It is determined by authority. The cases cited by Mr. Matthews are all uniform and consistent with the rule laid down in Hale de Jure Maris, and by Sir John Davis in *The Banne.* (2) Mr. M'Intyre's argument amounts to this,—It being conceded that the public have enjoyed the right of navigating this river at the spot in question, and as navigation is some evidence of ownership of the soil, the right to fish follows. But, to sustain his argument, he must go further, and shew not only that the public have the right stated in par. 5. A. of the case, but also that they have a right to take fish from the river at a point where it ceases to be tidal. The cases of *Reg.* v. *Burrow* (3) and *Bristow* v. *Cormican* (4), as explained by Mr. Matthews, do not in reality conflict with the strong current of decisions. The question is not whether the river Dee at the spot in question is more or less navigable, but whether the spot at which the respondent claims the right to fish is within the flow and reflow of the tide. I think it is a perfectly clear case, and that the appeal must be allowed.

HUDDLESTON, B. I also am of opinion that the justices were bound to convict. The whole case is disposed of when you read paragraphs 5 and 5. A. of the statement. The distinction is clear upon the whole current of authorities in this country and in Ireland, that, where a river is navigable and tidal, the public have a right to fish therein as well as to navigate it; but that, where it is navigable but not tidal, no such right exists.

Judgment for the Appellant.

Solicitors for appellant: *Bell, Brodrick, & Gray.*
Solicitors for respondent: *Hamlin & Grammer.*

(1) 3 App. Cas. 641.
(2) Davis, 55.
(3) 34 J. P. 53.
(4) 10 Ir. Rep. C. L. 398.

J. S.

1882

June 26.

VICARY *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Practice—Insufficient Answers to Interrogatories—Vivâ voce Examination—Costs—Order for Payment "in any Event"—Jurisdiction of Master—Order XXXI., r. 10—Order LIV., r. 2—Order LV., r. 1.

10 QBD 457

Where, in consequence of the party interrogated answering insufficiently, an order was made by the master for his examination vivâ voce before a special examiner:—

Held, that there was power under Order XXXI., r. 10, and Order LV., r. 1, or the general practice of the Court, to make it a term of the order that the costs of, and occasioned by, the application should be paid by the party interrogated "in any event."

MOTION by way of appeal from an order of Lopes, J., in Chambers, affirming an order of the Master directing that the plaintiff should be examined orally before a special examiner at her residence.

It appeared that the action was brought by the plaintiff under Lord Campbell's Act (9 & 10 Vict. c. 93) as administratrix of her husband. Interrogatories were administered to her by the defendants respecting the pecuniary damage which she had sustained by her husband's death, and her answers being insufficient, an order was made for a further answer, and ultimately an order for the oral examination of the plaintiff before a special examiner, as above-mentioned, was made, and that the costs of and occasioned by the application and order should be the defendants' costs in any event.

A. Cock, for the plaintiff. The master had no power to direct that the costs occasioned by the plaintiff's examination should be payable by her in any event. The order was made under Order XXXI., r. 10 (1), and not upon any application by her,

(1) Order XXXI., r. 10. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a judge for an order requiring him to answer, or to answer further as the case may be. And an order may be made requiring him to answer, or answer further either by affidavit or by vivâ voce examination, as the judge may direct.

By Order LIV., r. 2, the master may exercise the authority of a judge at Chambers—except in respect of awarding of costs other than the costs of proceedings before such master.

and under Order LIV., r. 2, the master has no jurisdiction to award costs other than the costs of any proceeding before him. Here the costs which he has ordered to be paid by the plaintiff, are costs to be incurred in a future proceeding—the examination before the examiner—and they cannot be considered as the costs of any proceeding before the master. He could only order the costs of what occurred before him, that is the making of the order, to be paid.

Dodd, for the defendants. There was jurisdiction under Order XXXI., r. 10, to order these costs to be paid by the plaintiff in any event. There could be no object in making them costs in the cause, inasmuch as they were incurred by the plaintiff's fault in making an insufficient answer, and her liability ought not to depend on the result of the action, especially where, as here, the defendants admit liability, and the only matter in dispute is the amount of the damages. There must be many cases where the master has to deal with costs to be incurred subsequently to the date of the order, as in the case of ordering the postponement of a trial owing to the absence of a witness. The plaintiff must contend that, even when a further answer by affidavit is ordered, the master could not order the costs to be paid by the party making it.

DENMAN, J. I am of opinion that the order of the master must be affirmed. It appears that application was made to him for the examination of the plaintiff vivâ voce on the ground that she had answered insufficiently in her affidavit in reply to interrogatories, and the master made an order under Order XXXI., r. 10, that the plaintiff should be cross-examined before a special examiner. On appeal from the master to the judge, the order was affirmed. The only part of the order which is objected to is that which directs that the costs of the examination shall be paid by the plaintiff. In nine cases out of ten it might be better to reserve any questions as to these costs for the trial, for otherwise there might be some risk of the examination being unduly protracted, but if the master had power to make the order, either under Order LV. or some previous practice which remains un-

1882

VICARY v. GREAT NORTHERN RAILWAY CO.

repealed, it is impossible to say that there are not cases where such an order might properly be made.

By Order LV., r. 1, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court, and I think it is a reasonable construction of this rule that the Court should have the power, without waiting for the end of the proceedings, to order that the costs of any step in the proceedings should in any event be borne by one or other of the parties, having regard to his conduct in any previous matter which had occurred before that event.

But even if the power be not conferred by Order LV., r. 1, I think that a discretionary power of the same character existed at the date of the Judicature Act, and which was not affected by the Act or the rules made under it, and that it would warrant the master in making this order. In either view there is no ground for disturbing this order, especially as it is a case where the judge has exercised his discretion.

POLLOCK, B., concurred.

Order affirmed.

Solicitor for plaintiff: *R. Chapman.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

A. P. S.

June 14.

GRAVES *v.* TERRY.

Practice — Pleading — Time — Reply, Delivery after Time — Judgment on Admissions in Pleadings — Order XXIX., r. 12 — *Order XL., r.* 11.

The plaintiff delivered his reply after three weeks had elapsed from delivery of the statement of defence, and subsequently the defendant, treating the facts stated in the defence as admitted, under Order XXIX., rule 12, by reason of the plaintiff's failure to reply in time, gave notice of motion for judgment under Order XL., rule 11:—

Held, that, the reply having been actually delivered before the notice of motion was given, the defendant was not entitled to judgment.

MOTION by the defendant for judgment upon admissions of fact in the pleadings.

Claim for damages for personal injury caused to the plaintiff by the negligent driving of the defendant.

The statement of defence alleged that the plaintiff was guilty of contributory negligence.

The plaintiff delivered his reply after three weeks had elapsed from the delivery of the statement of defence, and without having obtained an extension of time for replying.

The defendant delivered notice of the present motion after delivery of the reply.

Buck, for the defendant. Order XXIV., rule 1, is peremptory that the plaintiff "shall" deliver his reply within three weeks after delivery of the defence. By Order XXIX., rule 12, if the plaintiff does not deliver a reply within the period allowed for that purpose, "the pleadings shall be deemed to be closed at the expiration of that period, and the statements of facts in the pleading last delivered shall be deemed to be admitted;" and by Order XL., rule 11, any party to an action may at any stage thereof apply to the Court or a judge for such order as he may, upon any admissions of fact in the pleadings be entitled to.

The reply here not having been delivered in time, and no extension of time having been obtained, the defendant is entitled to judgment: *Lumsden* v. *Winter* (1); *Jenkins* v. *Davies* (2); *Rutter* v. *Tregent*. (3)

Poulter, for the plaintiff, was not heard.

FIELD, J. This is an attempt to obtain a judgment decisive of the whole question between the parties upon admissions of fact in the pleadings deemed to be made by virtue of Order XXIX., rule 12. But the reply, though delivered after time, is a perfectly good one unless the Act says it shall not be so. No doubt the Act does clearly say that, so long as no reply is delivered after the time has elapsed, the pleadings may be taken to be closed, and in strictness the defendant is entitled to judgment. But the question would then be whether the plaintiff deliberately intended not to reply; it would be a question of costs merely, and reply

(1) 8 Q. B. D. 650. (2) 1 Ch. D. 696.
(3) 12 Ch. D. 758.

1882

GRAVES v. TERRY.

might always be delivered on terms. *Lumsden* v. *Winter* (1) differs from the present case, because no reply had been delivered; the pleadings at that stage were practically closed, and there were materials upon which the judgment could be maintained. No case has gone so far as to decide that where, as here, reply has been actually delivered, judgment can be signed against the plaintiff. I think the motion must be refused.

CAVE, J. I am of the same opinion.

Motion refused.

Solicitor for plaintiff: *Sampson.*
Solicitors for defendant: *Rose & Fry.*

W. A.

June 16.

PARSONS, APPELLANT; THE BIRMINGHAM DAIRY COMPANY, RESPONDENTS.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 13, 14, 20, 21—*Private Purchaser—Public Officer—Penalty, Proceedings to recover—Notification to Seller of intention to have Article analysed—Condition precedent.*

The provisions of s. 14 of the Sale of Food and Drugs Act, 1875, apply to the purchase of an article by a private person as well as by one of the public officers named in the Act; so that it is a condition precedent to the right of a private purchaser to take proceedings for a penalty under the Act that he should have given to the seller the notification required by that section.

CASE stated for the opinion of the Queen's Bench Division by the stipendiary magistrate of Birmingham.

The appellant, a farmer, living at Newton near Rugby, had some time previously to Sunday, the 26th of February, entered into a contract with the respondents to supply them with a quantity of milk daily, to be delivered at the New Street Station of the London and North Western Railway Company at Birmingham, and on that day a can of milk containing six gallons was brought by the servants of the appellant to the Clifton Mills Station of the London and North Western Railway and delivered by the railway company at their New Street Station in Birming-

(1) 8 Q. B. D. 650.

ham. After remaining on the platform about three-quarters of an hour the milk was carried by the servants of the respondents to their premises in Birmingham; and a portion of the milk was, immediately on its arrival, taken out of the milk can and placed in a tumbler on a shelf in the respondents' shop, where it remained until Tuesday the 28th of February, when a portion of the milk in the tumbler was put into a bottle, and sent on the same day to the borough analyst, who found it to contain thirty-three per cent. of water, and gave his certificate to that effect. The certificate was produced at the hearing of the summons.

No notification was given to the seller or his agent of an intention to have the milk analysed, or that the analysis had been made, until Wednesday, the 1st of March, when a portion of the same milk was offered to him for analysis, but he declined to receive it or have it analysed.

The magistrate was of opinion that ss. 13, 14, and 15 of 38 & 39 Vict. c. 63, applied only to cases where the article of food was purchased by a public officer with the intention and for the purpose of submitting the same to analysis, and that ss. 6, 12, 20, and 21 (1) were intended to apply to a case like the present

(1) By s. 6. "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds."

"12. Any purchaser of an article of food or of a drug in any place being a district, county, city, or borough where there is any analyst appointed under this or any other Act hereby repealed, shall be entitled on payment to such analyst of a sum not exceeding ten shillings and sixpence, or if there be no such analyst then acting for such place, to the analyst of another place of such sum as may be agreed upon between such person and the analyst, to have such article analysed by such analyst, and to receive from him a certificate of the result of his analysis."

"13. Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts, or if there be no such analyst then acting for such place to the analyst of another place, and such analyst shall, upon receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer wherein he shall specify the result of the analysis."

1882

PARSONS v. BIRMINGHAM DAIRY CO.

where a private individual purchased an article of food in the course of business and for his own consumption, and not for the purpose and with the intent of having it analysed, and that the respondents by obtaining an analysis in the manner above stated, had done all that the Act required.

Being satisfied upon the evidence that an offence had been committed by the appellant, the magistrate convicted him and imposed a penalty.

If the Court should be of opinion that the magistrate's construction of the Act was erroneous in point of law, the conviction was to be quashed; if they should be of the contrary opinion, the conviction was to be confirmed.

J. Vesey Fitzgerald, for the appellant. Sect. 14 of the Sale of Food and Drugs Act, 1875, applies to a purchase by any person with the intention of having the article analysed. It is a condition precedent to the right of any one—whether a private person

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"14. The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such a manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent.

"He shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst."

"20. When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence, before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner.

"Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the eleventh and twelfth of Victoria, chapter forty-three."

"21. At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness, and the parts of the articles retained by the person who purchased the article shall be produced."

or a public officer—to recover a penalty under s. 20, that the provisions of s. 14 should have been complied with, otherwise the possibility of independent analysis is destroyed. The legislature intended to prevent the possibility of the article being tampered with before it comes into the analyst's hand.

The notification "forthwith" to the seller of the intention to have the article analysed has, in *Barnes* v. *Chipp* (1), been held to be a condition precedent to the right to take proceedings in the case of a public officer. In *Rouch* v. *Hall* (2) the notification was held not to be necessary where milk in course of delivery was seized by the public officer under the Sale of Food and Drugs Act Amendment Act, 1879; that case therefore has no application to the present.

P. Baylis, for the respondents. Sects. 13 and 14 of the Act of 1875 must be read together as applying only to public officers procuring articles for the purpose of analysis. The legislature cannot have intended that persons purchasing articles in bulk in the ordinary manner should go through the formalities prescribed by s. 14. From the nature of the transaction a person purchasing privately would be unlikely to suspect any defect in the article at the time of delivery, and if he found it out afterwards, according to the construction contended for on behalf of the appellant, no proceedings could be taken.

FIELD, J. I am unable to agree with the learned magistrate in the conclusion he has arrived at upon the construction of the statute, which was passed in order to protect the public against the adulteration of articles of food and drugs, and is of great public interest and importance. The legislature has imposed heavy liabilities upon the seller of adulterated articles, but has at the same time taken precautions that he shall be protected against the contingency of the articles said to be adulterated being tampered with after they have left his possession. I think the intention of the Act is to strike at the moment of time at which the seller parts with the article. That was clearly the intention under the Act of 1875, though the Amending Act of 1879 still further affects the liability of the seller by enacting with respect to milk that a

(1) 3 Ex. D. 176. (2) 6 Q. B. D. 17.

1882

PARSONS v. BIRMINGHAM DAIRY CO.

sample may be procured by an officer, inspector, or constable, during the course of delivery to the purchaser or consignee in pursuance of the contract of sale. Under s. 14 of the Act of 1875 the purchaser of any article with the intention of submitting it to analysis shall, after the purchase has been completed, "forthwith" give the seller the notification provided by the section. We have not to decide whether or not the respondents purchased with the intention of having the milk submitted to analysis; the facts shew that they kept it on their premises for two days, and gave no notification to the seller of any intention to have the analysis made until the third day.

The magistrate held that the provisions of s. 14 applied only to cases where the articles were purchased by a public officer with the intention of submitting it to analysis. The question for the determination of this Court is whether that construction of the Act is a sound one—whether the beneficial provisions in the interest of the seller contained in ss. 14 and 15 of the Act of 1875 apply only to cases in which the articles are procured by public officers, or apply also where the articles are supplied to a private purchaser. I am unable to find any good reason why ss. 14 and 15 should not apply to sales to a private purchaser. The offence which the Act strikes at is specified in s. 6; it is selling "to the prejudice of the purchaser" any article, &c. By s. 12 the purchaser of an article of food or a drug shall be entitled to have an analysis by the public analyst. By s. 13 a public officer may procure a sample of the article, and if he suspect it to have been sold to him contrary to the provisions of the Act, "shall submit the same to be analysed." I think s. 13 brings the public officer into the same condition as the purchaser mentioned in s. 12; they are both entitled on payment of a sum of money to have an analysis made and a certificate given. Then follows s. 14 which provides what is to be done by "the person purchasing" any article with the intention of submitting it to analysis. The only previous mention of a person "purchasing" is in ss. 6 and 12. I can therefore see no reason why s. 14 should be limited to the case of a public officer purchasing. The language of the section is quite large enough to cover the case of a private purchaser, and that case is in my opinion within the intention of the section. There

appears to be no reason in principle why the operation of s. 14 should be limited in the way suggested for the respondents. On these grounds I am of opinion that there should be judgment for the appellant.

CAVE, J. I am of the same opinion. Sect. 12 of the Act of 1875 entitles an ordinary purchaser to obtain an analysis and certificate from the public analyst. Sect. 13 entitles any one of the public officers named in the section to the same things. Sect. 20, under the general heading "Proceedings against offenders," brings the two links together by enacting that, where the analyst having analysed any article shall have given his certificate of the result from which it may appear that an offence against the provisions of the Act has been committed, "the person causing the analysis to be made," which in my opinion includes both the public officer and the ordinary purchaser, may take proceedings for the recovery of the penalty imposed therein for the offence. By sect. 21 at the hearing of the information the production of the analyst's certificate shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness, "and the parts of the articles retained by the person who purchased the article"—whether he be an ordinary purchaser or public officer—"shall be produced." Now the parts which he is to produce are the parts into which the article has been divided, and of which he retained one, under s. 14, because that section contains the only provision for dividing the article into parts and retaining one of the parts. It is clear therefore that s. 14 applies to an ordinary purchaser as well as to a public officer. I agree that the appeal should be allowed.

Judgment for the appellant.

Solicitors for appellant: *J. & W. Maude.*
Solicitors for respondents: *Royle, Foss-Smith, & Royle.*

W. A.

1882
Feb. 15.

[IN THE COURT OF APPEAL.]

CHARD AND ANOTHER *v.* JERVIS.

Debtors' Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5, *subs.* 2—*Order of Commitment —Means of Judgment Debtor.*

The plaintiff moved to commit the defendant for default in payment of a judgment debt of 29*l.* for goods supplied to him, the application being supported by an affidavit that the defendant kept up a large establishment, and was to all appearance a man of means. The defendant made an affidavit stating that he was an undischarged bankrupt, had no money, and was unable to pay the plaintiff's demand, and that his wife's property was settled to her separate use. Stephen, J., made an order committing the defendant for six weeks, or until payment, and this order was affirmed by a Divisional Court. The defendant appealed, and filed a further affidavit shewing that he was living in a very small way, and that the expenses of the establishment were all paid by his wife out of her separate estate.

The Court of Appeal being satisfied that the defendant had no means of payment discharged the order for committal.

Harper v. *Scrimgeour* (5 C. P. D. 366), and the observation of James, L.J., in *Esdaile* v. *Visser* (13 Ch. D. 421) observed upon.

THE plaintiffs sued the defendant for 24*l.* 14*s.* for corn, &c., supplied to the defendant. The defendant did not appear to the writ, and on the 28th of December, 1881, the plaintiffs signed judgment against him for 24*l.* 14*s.* debt and costs, which were taxed at 4*l.* 6*s.*

The plaintiffs applied to commit the defendant for non-payment, and in support of the application one of the plaintiffs made an affidavit in which he deposed that the defendant resided at Cherrington Park, and kept up a large establishment there, and was to all appearance a man of means; that the deponent was informed and believed that the defendant was continually in the hunting field and kept several horses, some of them hunters, at Cherrington Park, but that they together with the furniture, carriages, and effects there were claimed by the defendant's wife or her trustees. That from the defendant's mode and style of living the deponent believed him to be in a position to pay the above amount due to the plaintiffs.

The defendant made an affidavit as follows:—

"In the year 1874 I was duly adjudicated a bankrupt, and

have not obtained my discharge under that bankruptcy. Since the date of my bankruptcy I have not earned or otherwise acquired, and I am not now possessed of any money or property of any description whatever, and I am quite unable to pay the plaintiffs' claim in this action, or any part thereof. My wife has an income settled to her separate use, but I have no interest whatever in the capital or income of the funds from which she derives such income. It is not true that I am continually in the hunting field. In fact I have never ridden to hounds whilst I have resided in the county of Gloucester."

Upon these materials Stephen, J., on the 23rd of January, 1882, made an order that the defendant should be committed for six weeks from the date of his arrest, or until he should pay the 29*l.* with interest, and the costs of the order, and the sheriff's fees.

The defendant applied to a Divisional Court to discharge this order, and on the 9th February, 1882, the application was refused with costs. The defendant appealed.

In support of the appeal the defendant made a further affidavit, in which he deposed that his address of Cherrington Park was derived from an estate of about 1700 acres, but that the house in which he lived was an old farmhouse converted into a residence, which was rented furnished with a garden at 100*l.* a year, and that the rates and taxes were between 10*l.* and 12*l.* a year. That his wife had two maidservants whose wages amounted to 15*l.* per annum and no more, and a boy who worked outside at wages amounting to 12*l.* per annum and no more, and that these were all the servants who were kept, and that the rent, rates, taxes, and wages were all paid by his wife. That he had no horse, and that his wife had one only, and that its value did not exceed 10*l.* That the premises were four miles from a railway station, and the same distance from the nearest town; that there were no shops in the neighbourhood, and it was necessary to keep a horse to supply the house with necessaries. That he never before, at, or after his marriage had made any gift, settlement, or other disposition in favour of his wife; that her property came entirely from her family, and was settled on her and the children; that he had no interest under the settlements, and that she had no power to

1882

CHARD v. JERVIS.

give him any except in default of children, of whom there were three. That he had not ridden to hounds or hunted anywhere for the last eight years, and had ceased to belong to any club eight years ago, and was not now a member of any club. That his bankruptcy had never been closed, and that a Mr. Saffery was the trustee under it.

One of the plaintiffs made an affidavit in opposition, which stated that to the deponent's information and belief the defendant had up to recently kept seven servants at Cherrington Park, and now had two or three domestic servants, a governess, and a man-servant. That the defendant was almost daily driving about the country and frequently with his livery servant, and the horse and carriage were not kept for the purpose of getting necessaries for the establishment, but for the defendant's own use and pleasure. That the defendant kept up the appearance of a country gentleman and man of means, and that from his mode of living the deponent believed he was in a position to pay the debt. That the defendant did not inform the plaintiff of his being an uncertificated bankrupt when he ordered the goods.

H. Matthews, Q.C., and *Archibald*, for the defendant. It is conclusively shewn that the defendant has no means to pay, and there is no jurisdiction to commit him unless the Court is satisfied that he has.

Tindal Atkinson, contrà. The style in which the defendant lives is primâ facie evidence of his having means to pay such a debt as this. *Harper* v. *Scrimgeour* (1) is identical with this case.

[JESSEL, M.R. I do not know why that case was reported, it is a mere finding of fact.]

Esdaile v. *Visser* (2) shews that where a judge has been satisfied of a debtor's ability to pay the Court of Appeal will not interfere.

[JESSEL, M.R. You have no evidence here of ability to pay, nothing but information and belief. That calls for an answer, but statements as to information and belief are not made evidence by your not believing the contradiction of them.]

Then the point was taken that because the debtor was an undischarged bankrupt he could have no property, but that is

(1) 5 C. P. D. 366. (2) 13 Ch. D. 421.

answered by *Ex parte Dewhurst.* (1) The defendant does not swear that he has never since the judgment had means to pay.

JESSEL, M.R. What the Court below would have done if the whole of the evidence now before us had been before it I cannot say. The question is a pure question of fact, whether "it is proved to the satisfaction of the Court that the person making default has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default." We have been referred to *Esdaile* v. *Visser.* (2) Every remark of James, L.J., is entitled to great respect, but when his lordship says that it would require an overwhelming case to induce the Court of Appeal to differ from the judge if he says he is satisfied of the debtor's ability to pay, I think the adjective rather too strong. I agree that it requires a strong case; indeed we never ought to overrule the decision of the Court below on a question of fact unless it is clearly made out that the decision is wrong, and probably James, L.J., meant no more than this. In that case, moreover, the Lord Justice observes that all the materials had been before the judge. In the present case we have before us important materials which were not before the Court below. It must not be supposed that I approve of the conduct of the defendant; so far as I am entitled to say anything on the subject, I highly disapprove of it. He is living on his wife's separate estate, and orders goods in his own name. When the tradesmen apply to him for payment he does not say, "Apply to my wife," but lets them obtain judgment against him and apply to commit him. But the power to commit him depends on the judge being satisfied that he has means to pay. The case of *Harper* v. *Scrimgeour* (3) is of no weight on the present occasion. The judges there came to a particular conclusion of fact, and their doing so does not bind even a Court of co-ordinate jurisdiction to come to the same conclusion in any other case. We cannot tell why the judges came to that conclusion; they may have had reasons for disbelieving the debtor's evidence, and no rule of law can be deduced from the case. Here we have a circumstance which did

(1) Law Rep. 7 Ch. 185. (2) 13 Ch. D. 421.
(3) 5 C. P. D. 366.

1882

CHARD v. JERVIS.

not exist there, that, as the plaintiff himself tells us, the houses, furniture, carriages, and effects were claimed by the wife and her trustees. The plaintiff's affidavit only comes to this that from the defendant's mode and style of living, the deponent believes him to be in a position to pay the debt. This called for an answer, but statements of this kind are not evidence unless the opposite party fails to contradict them. We cannot legislate in the matter. It is not a creditable thing for a gentleman who is maintained by his wife to contract debts and not pay them, but unless the Court is satisfied that he has means to pay them it has no jurisdiction to send him to prison for non-payment. His wife may be making him an allowance by paying his debts without giving him any money, and we cannot assume that he ever has any money in his pocket, for there is no evidence that his wife allowed him any. The fresh affidavit of the defendant clears up the case materially, and leaves no reason for inferring that he ever has any money in hand. I cannot hold that because he contracts debts without means of paying them his affidavit is to be disbelieved. We should be creating a new jurisdiction if we were to send a man to prison in order to oblige his wife to pay his debts.

HOLKER, L.J. I feel sympathy with the tradesmen in this case and none with Captain Jervis. His conduct is dishonest, but it does not follow that he is to be sent to prison unless the conditions of the Act are complied with. In order to succeed in their application the plaintiffs must shew that Captain Jervis has means to pay, and the question is whether that has been made out. The affidavit filed by the plaintiffs probably was primâ facie sufficient, but it has been answered, and, taking the whole of the affidavits together, I think it is shewn that the defendant has no means. The Court cannot come to any other conclusion unless all the evidence of Captain Jervis is to be disbelieved, and I agree with the Master of the Rolls that there is no sufficient reason for disbelieving it. As to the dictum of James, L.J., in *Esdaile* v. *Visser* (1), that the evidence must be "overwhelming" to induce the Court of Appeal to differ from the Court below in these cases,

(1) 13 Ch. D. 421.

I think it cannot be admitted without considerable hesitation. I cannot see any difference between these cases and any other case of an appeal on questions of fact. In order to reverse the conclusion of a Court below on a question of fact, the Court of Appeal must be satisfied by clear evidence that the judgment was wrong, but if mathematical certainty were required there never could be an appeal at all in such cases.

Matthews, Q.C., asked for costs of the appeal.

JESSEL, M.R. We have discretion as to the costs, and to mark our disapprobation of the defendant's conduct we give no costs of the appeal. He has, moreover, succeeded upon evidence which was not before the Court below.

HOLKER, L.J., concurred.

Appeal allowed.

Solicitors for plaintiffs: *Clarke, Woodcock, & Ryland.*
Solicitor for defendant: *W. E. Ruddle.*

H. C. J.

THE NEWPORT URBAN SANITARY AUTHORITY *v.* GRAHAM. *April* 3.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Premises "adjoining or abutting on" a newly made Street.*

A. was the owner of three houses fronting a street called York Place, and adjoining or abutting at the rear upon a foot-path at the end of a street called St. Julian Street, which formed a cul-de-sac. The ground at the back of these houses was five feet above the level of St. Julian Street, and the wall, which was the property of A., was about twelve feet high on the outside. There was no access from A.'s premises to St. Julian Street:—

Held, that his premises "adjoined or abutted on" St. Julian Street within the Act, and consequently that he was chargeable with his proportion of the expenses of paving, &c., that street, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

CASE stated by Justices for Monmouth under 20 & 21 Vict. c. 43, s. 2.

Complaint having been made against Robert Graham, the respondent, for non-payment of 19*l.* 7*s.* 10*d.* due for expenses incurred by the urban sanitary authority of Newport in St. Julian Street, in the borough, under s. 150 of the Public Health Act,

1882

NEWPORT URBAN SANITARY AUTHORITY v. GRAHAM.

1875 (38 & 39 Vict. c. 55), and 9*s.* 8*d.*, for interest thereon, the justices dismissed the complaint.

At the hearing, a resolution of the town-council of Newport (acting as the urban authority) was put in, as follows:—"That the plans, sections, and estimates for street improvement works in St. Julian Street submitted by the surveyor be approved, and that notices under s. 150 of the Public Health Act, 1875, be served upon the owners and occupiers."

The plans, sections, and estimates were put in, and the town surveyor of Newport proved that works of pavement, channelling, and road-making had been carried out in St. Julian Street amounting to a certain sum, and that according to his apportionment there was due from the respondent in respect thereof 19*l.* 7*s.* 10*d.*, which with interest 9*s.* 8*d.* amounted to 19*l.* 17*s.* 6*d.*, the sum mentioned in the summons, and that such money had been expended by the urban sanitary authority in default of the owner doing the work required.

It was proved that notices to do the work required had been served upon the respondent, and also notices of demand of the amounts due; and it was admitted by the respondent that like notices had been served upon the occupiers of the houses Nos. 32, 33, and 34 York Place.

It was objected by the solicitor for the respondent that the justices had no jurisdiction to hear the complaint, inasmuch as proceedings had not been commenced within six months from the 2nd of May, 1881, the date of service upon the respondent of the notice of the surveyor's apportionment. The objection was overruled under s. 257 of the Public Health Act, 1875, the service of notices of demand being on the 8th of August, 1881, and the complaint having been made and proceedings commenced within six months of that day, viz. on the 1st of February, 1882.

It was proved by Mr. Kirby, the town surveyor, that he had apportioned against the respondent, as the owner of houses Nos. 32, 33, and 34 in York Place, the sum of money previously mentioned, viz. for eleven feet of the back yard of No. 32, which abuts upon the top of St. Julian Street; for twenty-one feet four inches of No. 33, which in like manner abuts upon the top of St. Julian Street; and for eleven feet of No. 34, which abuts in like manner.

There was no dispute as to the fairness of the amounts, or any questions raised as to the amounts apportioned.

On cross-examination the town surveyor said, that he took the whole of the frontage of the top house in St. Julian Street on the right hand side as part of the frontage abutting on the street. "It leaves when I have taken that the same measurement as I have stated. There are eleven feet of frontage of No. 32. I have paved eleven feet. The height of the wall at the back, i.e., of the four houses in York Place, is nine or ten feet. The ground may be higher there. There is no entrance to these houses from St. Julian Street. The top house in that street abuts on the boundary walls, and runs up to the back wall of Mr. Graham's house. Eleven feet of 34 York Place abuts on St. Julian Street. The eleven feet taken from the road extends from the boundary of 33 to the corner of the top house on the left hand side. The pavement is about six and a half feet wide, including channelling. If York Place was paved, Mr. Graham's property would have to bear its share."

The houses Nos. 32, 33, and 34 York Place of which the respondent is the owner, have open back yards behind them, the ground of which is bounded by a stone wall about twelve feet high, which wall separates them from the top of St. Julian Street, forming a cul-de-sac; and there is no door in this wall, or access in any way to St. Julian Street.

It was argued on behalf of the respondent,—1. That his property derived all street advantages of access, lighting, postal matters, channelling, and sewering, &c., at the front in York Place; 2. That the boundary wall at the back of the respondent's property separates and divides it entirely from St. Julian Street, and the level of the ground at the back thereof is about five feet above the level of St. Julian Street; 3. That the houses in that street have been on one side built up to and adjoin the said boundary-wall, and on the other side to within a few feet thereof; 4. That, if the urban authority should call upon the owners in York Place to pave and channell, &c., the respondent would have to pay his share for these improvements at the front of his houses; 5. That there was no access direct or indirect to or from the said houses into St. Julian Street; and, 6, that the said

1882

NEWPORT URBAN SANITARY AUTHORITY v. GRAHAM.

houses did not "abut," within the meaning of s. 150 of the Public Health Act, 1875, upon St. Julian Street.

The question for the opinion of the Court was, whether the respondent under the above circumstances was liable to pay the amount claimed.

W. Graham, for the appellants. The justices decided upon the authority of a dictum of Cockburn, C.J., in *London School Board* v. *St. Mary, Islington.* (1) That case, however, is no authority against the appellants. The school-house did not immediately front the street which had been paved, but stood back from it some seventy or eighty feet, in a large yard. There was a row of eleven small houses (with gardens at the back of them) between the school-yard and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school-yard, with gates opening into the street in question; the width of the passage being twenty feet, and the length about sixty-four feet. It was properly held under these circumstances that the school-board were liable for the apportionment of the cost of paving, &c., the highway. The Lord Chief Justice (2) says: "It is essential to you to have premises to which the access is from that part of the street which is called highway; it is essential to you that you should have that street well paved and you get access. It matters nothing, practically, whether your front door opens actually on the street, or whether you go up a passage to get to your front door; you equally get the benefit of the street every time, whether on foot or in a carriage, you make use of the street as an access to your house." The case is in effect decided by *Reg.* v. *Newport Local Board* (3), where it was held that a railway and canal company whose premises abutted on a street,—the words being substantially the same as here,—but with a fence between them and the street, were liable to be charged, although there was no actual access to the street. It is immaterial whether the party charged derives benefit from the paving, &c., of the street.

(1) 1 Q. B. D. 65. (2) At p. 78.
(3) 3 B. & S. 341; 32 L. J. (M.C.) 97.

[CAVE, J. Actual benefit is not necessary; it is enough if there is a possibility of benefit.]

[*Mayor of Manchester* v. *Chapman* (1), and *London and North Western Ry. Co.* v. *St. Pancras Vestry* (2) were also cited.]

Howard Smith, for the respondent. It would be a considerable hardship on the respondent to hold him liable to contribute to the expense of paving, &c., St. Julian Street, where he gets no access to his premises, when he has already contributed to the making up of York Place. The *Mayor of Manchester* v. *Chapman* (1), may be cited against the respondent. But he relies on the dictum of Cockburn, C.J., in *London School-Board* v. *St. Mary, Islington* (3), that, to render the premises chargeable, there must be access and beneficial enjoyment in his premises. Here by reason of the difference of level the possibility of beneficial enjoyment is negatived.

MATHEW, J. The words of the Act are "adjoining or abutting." Here the respondent's premises clearly adjoin and abut on St. Julian Street. We cannot disregard or depart from those plain words. The party charged is generally benefited; therefore liable. The Act says nothing about difference of level. The cases of *Reg.* v. *Newport Local Board* (4) and *Mayor of Manchester* v. *Chapman* (1) are binding upon us; and we have no alternative but to allow this appeal.

CAVE, J. I am of the same opinion. The case falls literally within the words of s. 150 of the Public Health Act, 1855. Possibility of benefit is sufficient. If it had been shewn that the wall at the end of St. Julian Street did not belong to the respondent, or that a strip of land intervened between his premises and the street, they would not have been adjoining or abutting. But that is not this case.

Appeal allowed.

Solicitors for appellants: *Cole & Jackson.*

Solicitors for respondent: *Raw & Co.*

(1) 37 L. J. (M.C.) 173.
(2) 17 L. T. 654.
(3) 1 Q. B. D. 65.
(4) 3 B. & S. 341; 32 L. J. (M.C.) 9[illegible].

J. S.

1882
June 15.

[IN THE COURT OF APPEAL.]

HODGSON AND ANOTHER *v.* THE RAILWAY PASSENGERS ASSURANCE COMPANY.

Practice—Reference to Arbitration—Stay of Proceedings—Railway Passengers Assurance Company's Act, 1864 (27 & 28 *Vict. c. cxxv.*).

By the Act regulating an insurance company it was provided that any question arising under any policy should, if either the company or the assured or the representatives of the assured required it, be referred to arbitration under the Act, and it was provided that if a policy-holder or his representatives commenced any action a judge might, on the application of the company "upon being satisfied that no sufficient reason exists why the matter cannot be or ought not to be referred to arbitration" stay proceedings in the action. An action having been commenced by the representatives of a policy-holder to recover the sum assured, the company disputing their liability, the company obtained an order to stay proceedings in the action in order that the dispute might be referred to arbitration:—

Held, that the burden lay on the plaintiffs to shew that some sufficient reason existed why the dispute should not be referred to arbitration, and not on the company to shew that no such reason existed, and that as no such reason had been shewn the order to stay proceedings was right.

THIS was an action by the executors of a Mr. Graham to recover the moneys assured by a policy in case of death by accident.

By the Railway Passengers Assurance Company's Act, 1864 (27 & 28 Vict. c. cxxv.), it was enacted as follows:—

"3. Any question from time to time arising on any contract of insurance hereafter entered into by the company, or hereafter at the company's option renewed by them, either by their receipt of premium thereon or otherwise, whether as to the liability of the company or as to the amount or proportionate amount of compensation or otherwise, shall, if either the company or the assured or the representatives of the assured require it, be referred to arbitration under this Act.

"16. If there be any question or difference as to the liability of the company to make compensation to any holder or party or his legal representatives, or as to the amount or proportionate amount of the compensation to be made, or if there be any other question relating to the company's contract of insurance, or the

incidents or consequences thereof, or any claim arising thereon, the question or difference shall, if either the company or the holder or party or his legal representatives require it, and as a condition precedent to the enforcing of any claim to which the question or difference relates, be referred to arbitration in manner following (that is to say): . . .

"33. If any holder or party or his legal representatives shall commence any action at law or suit in equity against the company in respect of the matters or any of them to be referred to arbitration under the provisions of this Act, the Court in which the action is brought, or a judge thereof, on application by the company after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why the matters cannot be or ought not to be referred to arbitration, and that the company were at the time of the bringing of the action or suit, and still are ready and willing to concur in all acts necessary and proper for causing the matters to be decided by arbitration, may make a rule or order staying all proceedings in the action or suit on such terms as to costs and otherwise as to the Court or judge seem fit."

The policy provided (inter alia) for payment of a certain sum to the representatives of the assured in case of his sustaining personal injury caused by accident, and such injury occasioning his death within three calendar months from the happening thereof. The fourth condition of assurance indorsed on the policy was, "Any question as to the liability of the company to pay the sum assured by this policy in the case of fatal accident, or to make any compensation at all in case of personal injury, or as to the amount of compensation, or otherwise howsoever arising hereunder, shall, if the company or the assured or his legal representatives require it, be referred to arbitration in the manner specified in the company's said Act."

The action having been commenced the company applied for an order to stay proceedings in it, supporting their application by an affidavit which stated the policy; that a death had occurred under which a claim was made, that the company denied their liability and were desirous that the question of liability should be referred to arbitration, in pursuance of their Act; that the application was not made for the purpose of delay, and that the

1882

HODGSON v. RAILWAY PASSENGERS ASSURANCE COMPANY.

deponent was not aware and did not believe that there was any just or reasonable cause or any good or sufficient reason existing why the matters in dispute could not or ought not to be referred to arbitration. The plaintiffs did not set out by affidavit any reason why the dispute should not be referred.

It appeared that the deceased was found dead at the foot of the stairs in his own house having fallen down there, and the question was whether he had been killed by falling or had died of disease and fallen in consequence. A coroner's inquest had been held, and a verdict of "accidental death" was returned. There had afterwards been a post-mortem examination, as to the result of which there was considerable dispute.

Master Pollock made an order for stay of proceedings, which was affirmed by Denman, J., in chambers, and his decision was affirmed by a Divisional Court. The plaintiffs appealed.

Gully, Q.C., and *Pitt Lewis*, for the plaintiffs. The case is one where the company must either be raising a question of law as to where the line can be drawn between what is death caused by accident and what is death caused by disease, or else they must be disputing the plaintiffs' claim as a fraudulent one. The circumstances clearly indicate death by accident. Such a case is one which should be tried in the regular way before a person having a competent knowledge of law. To preclude the plaintiffs from their right to a trial before a jury in the ordinary course, the Court must satisfy the judge that it is a case where no sufficient reason exists why the matter should not be referred to arbitration. The plaintiffs have a primâ facie right to have their case tried before a jury, and it is for the defendants to displace it.

[LINDLEY, L.J. I do not think that in the face of s. 33 the plaintiffs have such a primâ facie right.]

It is submited that under s. 33 the burden is on the company to satisfy the judge that there is no objection to arbitration.

Grantham, Q.C., and *Ridley*, for the defendants, were not called upon.

JESSEL, M.R. The only question here is whether the Court is satisfied that no sufficient reason exists why the matters in dispute

cannot or ought not to be referred to arbitration. No reason whatever has been adduced why they should not. I have always acted on the simple rule that where a party applying cannot adduce a reason in support of his application the judge may be satisfied that no reason exists. The plaintiffs here are in the position of a party applying, and if there is any reason why the matter should not be referred to arbitration, it is their duty to bring it forward and present it to the judge, and if they cannot do so the judge is quite justified in being satisfied that there is no reason. I am, therefore, of opinion that the order under appeal should be affirmed.

LINDLEY, L.J. I am of the same opinion. The appeal appears to be without any foundation.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiffs: *Holder, Roberts, & Gillett.*
Solicitors for defendants: *Ingram, Harrison, & Ingram.*

H. C. J.

1882
June 6.

[IN THE COURT OF APPEAL.]

PITMAN AND ANOTHER *v.* THE UNIVERSAL MARINE INSURANCE COMPANY.

Marine Insurance — Partial Loss — Insurance on Ship — Injury by Perils Insured against — Owner selling instead of repairing — Mode of estimating Liability of Underwriters.

Where a ship that is insured is injured by perils insured against, and the owner instead of repairing, sells her during the continuance of the risk, the loss to be made good by the underwriters depends on the depreciation in the value of the ship and not on the amount that it would have cost to repair her with an allowance in respect of new materials for old.

The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values, if no other means can be found for arriving at the loss really sustained.

The depreciation in value is to be ascertained by taking the value of the ship, if sound, at the port of distress, and her value there in her damaged condition. To ascertain the liability of the insurers, the proportion so arrived at should be applied to the real value of the ship at the commencement of the risk, if the policy be open, or to the agreed value if the policy be valued :—

So *held*, by Lindley, J., affirmed (except as to the mode of ascertaining the depreciation in value) on appeal by the majority of the Court; Jessel, M.R., and Cotton, L.J.; Brett, L.J., dissenting.

Held, by Brett, L.J., that the matter against which the owner was indemnified was the cost of repairs and not any diminution in the saleable value of the ship, and that therefore loss or gain by the sale of the ship was outside the contract of insurance and was not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship.

FURTHER CONSIDERATION.

The plaintiffs were the owners of the barque *Thracian*, and by a policy of insurance bearing date the 3rd of June, 1875, caused themselves to be insured for twelve calendar months upon the ship valued at 3700*l.* The defendants subscribed the policy for 1000*l.*, and it was agreed by memorandum that the insurance should commence from the 23rd of March, 1875.

The vessel sailed under charter from Singapore to Moulmein on the 24th of July, 1875, and arrived off that port on the 10th of August, 1875, and in passing up the river to the port of Moulmein, took the ground, and remained aground until the 14th of the same month, when she was got off and towed up to Moulmein.

The plaintiffs determined to abandon the vessel, and gave notice of abandonment, but the underwriters declined to accept it. The plaintiffs then, having made some slight repairs, sold the ship and stores for 3897*l.*

In the statement of claim the plaintiffs alleged that the value of the ship at the commencement of the risk was 4000*l.*, and that she was injured by perils insured against by the policy, and claimed 781*l.* 7*s.* 10*d.* as a partial average loss under the policy. The defendants paid 245*l.* into court.

The case was tried in May, 1881, before Lindley, J., who reserved for further consideration the question upon what principle the loss was to be ascertained.

June 25, 1881. *Butt, Q.C.* (*Pollard*, with him), for the plaintiffs. The question is whether the plaintiffs are entitled to the costs of the repairs, or only to the difference between the sound value of the ship and the nett proceeds of the sale. The plaintiffs gave notice of abandonment which was refused, and the defendants now ask to be placed in the same position as if they had accepted notice or to treat the loss as total with benefit of salvage. The sale and the proceeds of it have nothing to do with defendants' liability, except for the purpose of ascertaining the proportion: Arnould, Marine Insurance, 5th edit. p. 901; *Knight* v. *Faith.* (1) [He referred also to *Lidgett* v. *Secretan* (2); *Lohre* v. *Aitchison* (3); *Stewart* v. *Steele* (4); and *Brooks* v. *MacDonnell* (5).]

Cohen, Q.C. (*Hollams*, with him), for the defendants. The defendants in estimating the amount which they have paid into Court have followed the law: *Atwood* v. *Sellar.* (6) In *Lohre* v. *Aitchison* (3) there was more than a strict indemnity. The time at which loss is to be ascertained is the termination of the risk, not the time when the damage was done. *Knight* v. *Faith* (1) was wrongly decided, see *Potter* v. *Rankin* (7) and *Kaltenbach* v. *Mackenzie.* (8)

Butt, Q.C., in reply. The owner has always a right to repair,

(1) 15 Q. B. 649.
(2) Law Rep. 6 C. P. 616.
(3) 2 Q. B. D. 501.
(4) 5 Scott, N. R. 927.
(5) 1 Y. & C. 500.
(6) 5 Q. B. D. 286.
(7) Law Rep. 6 H. L. 83.
(8) 3 C. P. D. 467.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

and whether he does so prudently or imprudently can call on the insurers to pay up to the amount insured. The defendants say that if the vessel is worth 7000*l.* when repaired, and the repairs cost 7500*l.*, then the insurers are not liable for anything, which amounts to saying that the assured must abandon, which they are never obliged to do: see Phillips, 1494. It is a wrong principle to compare the damaged value at Moulmein with the sound value in England, and the inconvenience of having to ascertain the sound value at Moulmein is apparent: Lowndes on Insurance, 309–10.

Cur. adv. vult.

1881, July 4. LINDLEY, J. This is an action on a time policy for a partial loss, and the question I have to decide is the principle upon which the loss is to be ascertained, it being agreed that all questions of figures shall be referred to some gentleman versed in adjustments. The facts which are material are few and simple, and are set out in the claim. They are shortly these, that the plaintiffs were the owners of the barque *Thracian*, and by a policy of insurance dated the 3rd of June, 1875, they caused the vessel to be insured with the defendants for a period of twelve months from the 23rd of March, 1875, the vessel being valued at 3700*l.*, and the defendants subscribed themselves for the sum of 1000*l.* The vessel sailed on the 23rd of March from Launceston, in Tasmania, for Newcastle, New South Wales, where she arrived on the 3rd of April. She then sailed with a cargo of coals on the 6th of May to Singapore, and she arrived and discharged her cargo in June, 1875, that is to say she was in Singapore when the policy was signed. Then the vessel was chartered to proceed to Moulmein, and take in a cargo of teak. She grounded there, and the value of the vessel at the time of the commencement of the risk was 4000*l.* Those are in substance the facts. The vessel injured grounded on her way to Moulmein, and after remaining aground four days in some peril, she was got off and towed to Moulmein. She was there examined and was found to be seriously injured. The plaintiffs resolved to abandon her to the underwriters, and gave notice of abandonment. The underwriters,

however, declined to accept her, and required the plaintiffs to repair her. The plaintiffs did not insist on their abandonment, but, acting on the best advice they could obtain, determined not to repair her, but to sell her, and, after making some slight repairs, they accordingly did sell her and her stores for 3897*l.* Upon the evidence before me, and having regard to the want of proper dock accommodation and appliances at Moulmein, and the high charges there, I have come to the conclusion that the cost of repairing her so as to make her as good as she was before she grounded would have been about 5300*l.*, which is more than her value when repaired, such value being 4500*l.* or thereabouts. I have further come to the conclusion that it was not practicable to examine her bottom and to repair her temporarily, so as to enable her to continue her voyage in safety, without docking her and spending much more upon her than such temporary repairs would justify. In other words, I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling her in her damaged state, and substantially as she was when brought into a place of safety. Under these circumstances the plaintiffs have brought an action against the defendants to recover the amount of the loss sustained by the plaintiffs by reason of the injury to the ship by her stranding. The plaintiffs are clearly entitled to recover something, and the question is how much? The plaintiffs claim 781*l.* 7*s.* 10*d.* The defendants have paid into court 245*l.* The difference between the parties is attributable not to any dispute about figures, but to the circumstance that they differ entirely as to the principle upon which the calculations are to be based. The plaintiffs contend that the loss to be made good is to be measured by what it would have cost to repair the ship and make her as good as she was before she was injured, but deducting one-third of that cost so as to allow for new materials instead of old; whilst the defendants contend that this is an entirely erroneous principle, and that the loss to be made good is to be measured by the difference between the value of the ship when sound and what she sold for when damaged. The question for my decision is, which of these two principles is correct. It is certainly remarkable that the question thus raised should never

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Lindley, J.

have been yet decided, but such seems to be the case, and it consequently becomes necessary to consider the question on principle. The first thing which strikes the mind on a consideration of the foregoing statement is that, apparently at least, if not really, the plaintiffs are contending for a right to be indemnified against a loss which they have not in fact sustained. The repairs, the cost of which the plaintiffs seek to make the measure of their loss, were not in fact made. It becomes necessary, therefore, to be careful before an hypothetical as distinguished from an actual loss is held to be the loss in respect of which the plaintiffs are entitled to indemnity. The plaintiffs' contention is based upon the following assumptions: 1, That they might have repaired if they had chosen; 2, That if they had repaired the cost of repairs would be the measure of their loss; and 3, That it is immaterial to the defendants whether the repairs were actually effected or not. The first of these assumptions I take to be well founded: the assured is never bound to abandon; it is for him to determine whether he will do so or not; he can always repair if he chooses, and refrain from insisting on a total loss. This has been decided long ago, and I may refer amongst other cases to a discussion on this subject: *Peele* v. *Merchants Insurance Co.* (1) a case in which the rights of an assured in the event of stranding were elaborately examined by Story, J. The second assumption is also well-founded if the repairs are made bonâ fide and with reasonable discretion. Nothing can be stronger than the language of Story, J., on this point, in the case just cited. He says (p. 64): "The insured is in no case bound to abandon. He may in all cases elect to repair the damage at the expense of the underwriter, and if he acts bonâ fide and with reasonable discretion, there is no decision yet pronounced which declares that he shall not be entitled to a full compensation, however great it may be, even if it should equal or even exceed the original value of the ship, and until such a decision is made the direct terms of the policy seem strong enough to justify such a claim." See also 2 Arn. Ins. 1022, 3rd. ed.; and 2 Phill. Ins. s. 1426. But although this unquestionably is true, still, if the repairs are so extensive and so out of proportion to the value of the ship when

(1) 3 Mason, 27.

repaired as to shew a want of bona fides, or a total disregard of what is reasonable, it is by no means clear that their cost could be thrown on the underwriter. In fact it is tolerably plain that it could not. The language of Maule, J., on this head in *Stewart* v. *Steele* (1) is extremely cogent and valuable. He said: "As to the supposed duty of the underwriters to pay for the repairs, that is a mere fallacy; and the frequent statement of the proposition will not make it less fallacious; the law casts no such duty upon them. The assured is entitled to recover the amount by which the ship is deteriorated in consequence of the accident." This appears to me to be perfectly accurate, and I adopt it accordingly. The third assumption, viz., that, as the plaintiffs had the right to repair the ship and to recover the cost from the underwriters, it is immaterial to them whether the right is exercised or not, is in my opinion entirely erroneous and opposed to the true principles of contracts of indemnity. Against what do the underwriters agree to indemnify the assured? Surely against such loss as he may in fact sustain by reason of the perils insured against. That this is so is plainly proved by those cases which decide that, where a ship has been injured and not repaired, the assured must wait until the expiration of the risk before he can sue the underwriters for the loss he has sustained. The assured has no vested right of action when the injury is sustained. If in such a case the ship is lost whilst the policy is running by a peril not insured against, the assured has no right of action at all; and if she is lost by a peril insured against the assured can only claim for a total loss; he cannot claim both for a total loss and for the previous partial loss, as he may, if the damage has been actually repaired. Compare *Stewart* v. *Steele* (2); *Livie* v. *Janson* (3); *Lidgett* v. *Secretan*. (4) These cases are conclusive to shew that the events which have happened, and not those which might have happened, are to be regarded. Apart from all authority, I should have thought it plain that a loss actually sustained under circumstances which did happen is to be preferred as a measure of indemnity to a loss which would have been sustained under circumstances which did not happen, and the cases to which I have referred

(1) 5 Scott, N. R. 927, at p. 950.
(2) 5 Scott, N. R. 927.
(3) 12 East, 648.
(4) Law Rep. 6 C. P. 616.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Lindley, J.

shew that this principle is recognised as well in cases arising under marine insurance policies as in other cases of indemnity. Upon principle, therefore, it appears to me that the plaintiffs' contention cannot be supported. It is, however, said to have authority and practice in its favour. The authorities referred to are *Knight* v. *Faith* (1) and *Lidgett* v. *Secretan* (2); the practice is that of underwriters. In *Knight* v. *Faith* (1) the ship was damaged and sold unrepaired for 72*l.* 10*s.* The assured claimed for a total loss, but as there was no destruction of the ship, and no notice of abandonment, it was held that the assured could only recover for a partial loss. The proper mode of ascertaining the amount of this loss was not discussed, but there is a passage in Lord Campbell's judgment at p. 669 which I will read: "We therefore think that in this case the ship insured sustained a partial loss from which the assured ought to be indemnified. But they have left us entirely in the dark as to the amount of that indemnity. Their counsel has contended that, even on the footing of a partial loss, the verdict ought to stand for the full amount of the sum insured and interest. However, if there has not been a total loss of the ship, actual or constructive, with notice of abandonment, it lies upon them to shew the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing it, and from this there would be the usual deduction of one-third new for old. There having been no notice of abandonment, although the ship subsisted as a ship, we cannot proceed upon the supposition that she could not be repaired, and the partial loss must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired, soon after the policy expired. 'Such a calculation,' says Benecke, vol. 2, p. 499, 'cannot be governed by any general rule, but must be decided according to circumstances and upon a casual estimate in which no great precision can be expected, since it is extremely difficult after the ship has perished to obtain a precise knowledge of the condition in which the ship was at the termination of the fixed time. But this difficulty can never be a ground for freeing the insurer from all liability.' The

(1) 15 Q. B. 649. (2) Law Rep. 6 C. P. 616.

difficulty is not greater than was experienced in *Hare* v. *Travis* (1) where, there having been a policy upon pearl ashes at and from Liverpool to London, and the ship having deviated by going into Southampton, and the pearl ashes having been injured by sea damage both before and after the deviation, but never having been examined till they arrived in London, it was left to the jury to say what amount of damage they had sustained while protected by the policy." What ultimately became of this case I have not been able to ascertain; but I cannot regard it as an authority for the proposition that the estimated cost of repairs is in all cases the true measure of loss to the owner of a ship injured and sold without being repaired. Such estimated cost may or may not be the best measure of loss, and in *Knight* v. *Faith* (2), where the ship sold for next to nothing, it is quite possible that the estimated cost of repairs was a juster measure of the assured's right to indemnity than any other which could be suggested. Where such is the case the estimated cost of repairs will naturally be the basis of the underwriter's calculation, and it may so often happen in practice that this is the proper basis as to lead to the habit of regarding the estimated cost of repairs as the true basis in all cases of the kind under consideration. But care must be taken not to be misled by this circumstance, and not to mistake the rule for the principle on which it is founded. In *Lidgett* v. *Secretan* (3) the Court does not appear to sanction the proposition contended for by the plaintiffs. In that case the ship was insured by two policies for two successive voyages, viz., out and home. On the voyage out she was stranded and injured. She was partially repaired, and after the risk covered by the first policy had expired, and after the risk covered by the second policy had commenced, but before her repairs were completed, she was destroyed by fire. The Court decided that, although the ship was ultimately lost, and the plaintiff was entitled to recover under the second policy for a total loss, he was also entitled to recover under the first policy the diminished value of the vessel occasioned by her stranding. The estimated cost of repairs was merely referred to as a mode of estimating such

(1) 7 B. & C. 14. (2) 15 Q. B. 649.
(3) Law Rep. 6 C. P. 616.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Lindley, J.

depreciated value; and so far is this case from being an authority for the plaintiffs that it amounts, in my opinion, to a strong authority against them. Mr. Justice Willes, at p. 626, says: "The true principle I apprehend to be this: the owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk—the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of the value at the expiration of the risk. That, of course, must be subject to all proper allowances." The judgment of Sir Montague Smith in that case is to the same effect. The practice relied upon by the plaintiffs was not proved; indeed, the witnesses called to prove it said they had no experience of any settled usage applicable to the case of a damaged ship sold without being repaired. For the reasons and under the circumstances above stated, I am of opinion that the principle contended for by the plaintiffs is erroneous, and that, in substance, the principle contended for by the defendants is correct. The loss sustained by an assured by the stranding of the ship is primâ facie the depreciation in her value caused by the stranding. Before she stranded she was worth a certain sum; after she stranded she was worth less; the difference between these sums, if it can be ascertained, will be the true measure of the assured's loss, unless he can be shewn to have sustained a greater or less loss between the stranding and the expiration of the risk covered by the policy. That this is so in the case of goods is well established; but in point of principle, and for this purpose, there is no distinction between ships and goods, except that goods being saleable, their sound and damaged values can be readily ascertained by a sale, whilst the values of sound and damaged ships have generally to be ascertained by estimates. This is the view taken by the best text writers: see 2 Arnould on Insurance, 2nd ed. s. 365, and the rule as to ascertaining damage to the extent of 50 per cent. in America, 3 Kent's Com. 330, 331;

Phillips on Insurance, s. 1539; and by Story, J., in *Peele* v. *Merchants' Insurance Company* (1) already referred to. So also the judgments in *Stewart* v. *Steele* (2) and *Lidgett* v. *Secretan* (3) support the same view. Whether the values to be ascertained and compared are the values at the same place or at different places, and whether they are to be ascertained at the commencement of the risk or at its termination, or immediately before and immediately after the injury is sustained, are questions to be considered, and, having regard to the authorities just referred to, the correct mode of ascertaining the proportion of loss to be made good by the underwriter appears to be to compare the value of the sound ship at the port of distress with her value there when damaged, and to apply this proportion to her real value at the commencement of the risk if the policy be open, or to her agreed value if, as in the present case, the policy be valued. Such being the principle by which to be guided, it remains to apply it to the case before the Court, and to ascertain the value of the ship at Moulmein in her sound and damaged states and to consider the effect of her sale. For these purposes the declared value in the policy must be disregarded; for although such value is conclusive for the purpose of determining how much the defendants may ultimately have to pay, it does not preclude either party from proving the true amount of loss sustained: *Young* v. *Turing.* (4) The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values if no other measure could be found for arriving at the loss really sustained; but in this case other and more reliable evidence of the amount of such loss exists, and the estimated cost of repairs ought not therefore to be adopted for the purpose of arriving even indirectly at the measure of the loss sustained. The evidence as to the value of the ship when sound stands thus. The plaintiffs say she was worth 4000*l.* at the commencement of the risk; the defendants are content to adopt this statement. At this date the ship was at Singapore. The time which elapsed between the commencement of the risk and the stranding of the vessel was very short; and the time which

(1) 3 Mason, 27.
(2) 5 Scott, N. R. 927.
(3) Law Rep. 6 C. P. 616.
(4) 2 Man. & Gr. 593.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Lindley, J.

elapsed between her stranding and sale was also very short; and there is no reliable evidence to shew that the value of the sound ship at Moulmein at either of these two periods was greater than her value a short time before when she was at Singapore and the risk commenced. In the absence of such evidence her sound value at Moulmein ought, in my opinion, to be taken to be 4000*l.* In coming to this conclusion I do not forget that her value when thoroughly repaired has been estimated at 4500*l.*, nor do I overlook the argument that, as she fetched 3800*l.* in her damaged condition, she must have been worth at Moulmein, when sound, much more than 4000*l.* I regard the estimate of 4500*l.* as little better than a guess, and I cannot assume that, if she had been thoroughly repaired, according to Mr. Hopper's estimate, she would not have been more valuable than she was before she stranded, even after making the customary allowance of one-third new for old. The argument deduced from the price she fetched is plausible, but not convincing. I am not at all sure that she did not fetch more than she was worth, and although what she did fetch is conclusive as regards one element in the calculation, I do not regard it as a reliable starting point from which to draw an inference as to her sound value. Upon the evidence before me I hold that value to be 4000*l.* The value of the ship when damaged has next to be ascertained. But the object of this inquiry must not be lost sight of. That object is to ascertain the loss sustained by the plaintiffs, and they have fixed this element in the calculation by what the ship actually sold for. The underwriters may no doubt shew, if they can, that the plaintiffs' loss has not been so great as they allege, but the assured cannot possibly increase his actual loss by saying that he would have lost more if the ship had not sold for so much as she in fact realized. This, I apprehend, is what the present Lord Justice Lush meant when he said in *Lohre* v. *Aitchison* (1): "If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for." For these reasons it ought to be held that for all the purposes of this action the value of the ship when damaged cannot exceed what she actually sold for. But

(1) 2 Q. B. D. 501, at p. 507.

even for the purposes of this action the actual price she fetched will not be her exact value, for the price was no doubt enhanced by the repairs done to her before sale, and a proper allowance for these must be made. I merely mention this to prevent its being overlooked. The sound value of the ship being taken at 4000*l.*, and her damaged value being what she sold for, less such deduction as ought to be made in respect of her repairs before sale, the proportion of loss sustained by the plaintiffs by reason of the depreciation in value of the ship will be ascertained. To this will have to be added whatever other sums are properly chargeable against the underwriters; and when the final proportion of loss on this basis has been arrived at, it must be applied to a ship of the declared value of 3700*l.*, and the defendant's proportion of the loss thus calculated will be what he will have to pay. Having now explained the principle upon which the amount payable by the defendants is to be ascertained, so far as that amount depends on the point submitted to me, I give judgment for the plaintiffs for such sum as the arbitrator agreed upon shall award to be payable by the defendants, regard being paid to this decision; and I reserve the costs of the action until he shall have made his award.

A. M.

The plaintiffs appealed.

Dec. 9, 1881. *Butt, Q.C.*, and *Pollard*, for the plaintiffs. *Cohen, Q.C.*, and *Hollams*, for the defendants. (1)

Cur. adv. vult.

June 6, 1882. JESSEL, M.R. The question in this case is upon what principle ought the liability of underwriters to be determined, when the ship has been damaged by the perils of the sea, and has been sold during the continuance of the risk without being repaired, in a case where the amount required to restore her to the same condition as she was in before the injury would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her. In this instance the value of

(1) By direction of the Court the case was re-argued on the 24th of April, 1882, by one counsel on either side.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Jessel, M.R.

the ship in her damaged state was large, and to have repaired her would, according to the surveyors' report have caused a loss of 41,000 rupees, viz., 25,000 rupees the estimated amount of her value unrepaired, and the sum of 16,000 rupees being the difference between 45,000 rupees her estimated value when repaired, and 61,000 rupees the estimated cost of the repairs. It is plain that there being no special circumstances in this case no reasonable uninsured owner would have repaired the ship so as to restore her to her former condition.

The owners took this view and therefore determined to sell her, and having made some slight repairs, with a view to a sale, they sold the ship for much more than the estimated value in her damaged state, viz., for 38,000 rupees or thereabouts. The underwriters are willing to pay the whole of the loss actually incurred by the owners, viz., the difference between the value of the ship at the port of departure for the voyage, viz., 4000*l.*, and the amount of the net proceeds of the sale after deducting therefrom the amount actually expended for repairs, and this as I read the judgment is what they are to pay. If there is any doubt as to the meaning of the words on this point, I am willing that it should be removed by altering the wording of the judgment. On the other hand the owners claim two-thirds of the estimated cost of the repairs required to put the ship in the same condition as she was in before the injury. This proportion of the amount expended for repairs being the sum ordinarily payable by underwriters on the occurrence of a partial loss where the ship is an old one, as this was, and is not repaired. The precise question we have to determine does not appear to have been decided, nor can I find any case in which it has been even discussed, it remains therefore to be decided upon principle.

The contract of insurance is, as I understand, a contract of indemnity to the insured against the loss incurred by him through the ship being injured by the perils of the sea. It follows from this that as a general rule in no case can the insured become richer by reason of these perils, or in other words that the insured ought not to be entitled to receive from the insurer a larger sum for a single partial loss, than if the ship was wholly lost. Treating this as in effect a constructive total loss I consider

the amount recoverable to be an amount not exceeding, and therefore in a case like this equal to, what would be recovered as on a total loss. As to the value I think the value to be regarded is the value of the ship at the port of departure, but in this case it is not material, because I think the value at Moulmein before the injury was about the same. The estimated value was 45,000 rupees when the vessel was restored to its class, which at the exchange of 1*s.* 9*d.* $\frac{5}{8}$ths would be a little over 4000*l.*, but the vessel would after repair have been in all probability rather better than she was before the injury.

This being so, it appears to me that the decision of the learned judge in the Court below which was in favour of the underwriters, was substantially right, but I do not wish to be understood as concurring in all the reasons given by him for that decision. It seems to me both on principle and authority, that the rights of a shipowner, who actually repairs his vessel when damaged by the perils of the sea, to recover the amount or a portion of the amount expended in repairs from the underwriters, are not in all cases the same as those of a ship-owner who declines to repair because the ship is not worth repairing, and who therefore sells the ship during the risk, and I wish to confine my judgment to the latter case, which is the case before us.

I am therefore of opinion that the decision appealed from should be affirmed.

BRETT, L.J. The facts of this case are not in dispute; I do not think it is necessary to repeat them. The case was at my request argued a second time before us. Neither before Lindley, J., nor before us was it argued that there was a total loss of this ship. Both parties have advisedly confined the decision of this case to be dependent upon the assumption that there was only a partial or average loss of the ship. If they had not done so, I am not at all prepared to say, that the finding of Lindley, J.,—in which he says: "I find as a fact that a prudent uninsured owner would have done what the plaintiffs did, and that they did what was best for all interested in selling the ship in her damaged state,"—would not, if the assured had elected so to treat it, have justified the sale as against the underwriters, and have made a total loss of

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Brett, L.J.

this ship. But I think that the Court cannot decide this case upon such a view of it after the plaintiffs have elected to treat the loss as an average loss, and after the advised persistent arguments on both sides. It appears to me absolutely necessary throughout the consideration of this case to remember, that it is to be decided on the assumption that there was only an average loss on ship. The decision of this case upon the facts of it might have been easy and of little importance, if it had been treated as a total loss; but the doctrines suggested in argument and, as I think, countenanced by the judgment of Lindley, J., upon the assumption that this was a partial loss, have made the case to my mind one of the highest mercantile and legal importance.

On the first hearing before us it was contended on behalf of the defendants, first, that if a ship damaged by sea-peril is repaired by her owner, so as to be as good as she was before, but a jury find that it was unreasonable so to repair her, the liability of the underwriters must not be ascertained by a comparison with the cost of such repairs, but by ascertaining the difference between what the ship would have sold for damaged and unrepaired and what she would sell for repaired, and by comparing that difference with the value of the ship in the policy. The same argument was put in the following form: secondly, if it is unreasonable to repair the ship so as to make her as good as she was before, the assured, though he may of course in fact repair her, cannot so repair her as against the underwriters so as to charge them, and it is unreasonable so to repair her, if the cost of such repairs exceed the value of the ship when repaired. And again in this form: thirdly, where it would be so extravagant as to be unreasonable to repair an injured ship so as to make her as good as she was before, the shipowner ought not to repair her, and if he does, you must in such case ascertain the depreciation in value of the ship caused by the accident by ascertaining the difference between what the ship would sell for damaged and undamaged at the same place. And it was urged in each and every of these forms that it was a question for the jury whether a prudent uninsured owner would have undertaken the repairs. It seems to me that the judgment of Lindley, J., countenances, if it does not adopt, these arguments. It must be admitted that they are absolutely new.

In a case where the repairs were actually done, they were the arguments brought forward and overruled in the case of *Lohre* v. *Aitcheson* (1)) in all the Courts and in the House of Lords. It need hardly be observed that if the counsel for the defendants could have maintained any of these propositions as true in the case of repairs effected, they would have enforced them easily in a case where no such repairs had been done. It was further argued, fourthly, on the first hearing before us that whenever the damaged ship is sold without being repaired, the loss is to be ascertained by the same process as a loss on damaged marketable goods is ascertained. This formula would be so damaging to underwriters if the estimate of repairs were low, that stated in these terms I think it was at once abandoned. On the second hearing before us none of these arguments were again brought forward.

The arguments for the defendants on the second occasion were that the object of marine insurance is that the assured is to be put in the same position with regard to the subject insured as if he had not embarked on the adventure, and if a ship has been injured and not repaired, and a comparison with the estimated cost of repairs would produce a sum greater than the sum which would be due on a constructive total loss, the object is not attained except by paying the same sum as would be payable on a constructive total loss. It was pointed out that if this principle were correct as a principle it would be equally applicable to a case in which the repairs had been done, and that it would in such case break the rule that there is no salvage on an average loss; to which it was answered that there is a custom where repairs have been done, but that there is no custom where repairs have not been done.

It was further argued that repairs must be bonâ fide done, and that they cannot be done bonâ fide, if the cost of them, when done, would exceed the value of the ship when repaired, and therefore that no such possible or contemplated repairs could be considered in estimating an average loss on ship. But it was pointed out and admitted that such repairs might be bonâ fide incurred in order to earn a valuable amount of freight.

(1) 2 Q. B. D. 501; 3 Q. B. D. 558; 4 App. Cas. 755.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Brett, L.J.

The main argument in the end was that the law which affirms that a contract of insurance is a contract of indemnity obliges us to say that the assured cannot recover for a partial or average loss more than for a total loss, and that if the comparison with the estimated cost of repairs produces a sum equal to 100 per cent. of the sum insured, and the ship be allowed to be sold without the amount of the proceeds of sale being brought into the account, the assured will in such case, by recovering a full 100 per cent. without deduction of salvage, recover more than he would recover for a constructive total loss. This is the argument on behalf of the defendants which has given me so much trouble. As to all the others I confess that I feel no doubt that they are all untenable. The following propositions are all, I think, recognised as true in insurance law. The assured is not under any circumstances bound to sell his ship. The assured may under any circumstances sell his ship. He is entitled under any circumstances to repair his ship. He is not bound under any circumstances to repair his ship. In none of these respects does any question arise as to whether a prudent owner uninsured would act in the like manner. All this is so, because there is nothing in the contract of insurance which takes away from the assured the absolute power and right to do with his own property what he will. The assured, therefore, can always, whatever be the amount of damage done to his ship, repair her. If he does repair and keep the ship, there cannot be a total loss; the loss then must be a partial or average loss leaving open the question of how such loss is to be adjusted. But in the case of a partial or average loss there is no salvage. Therefore in such case, if the cost of repairs actually done in a reasonable way at a reasonable cost so as to make the ship equal to what she was before the accident equals or exceeds 100 per cent. of the sum insured, the assured, in respect of such average loss on ship, recovers 100 per cent. of the sum insured without any deduction. That was the decision in *Lohre* v. *Aitchison*. (1) The assured need not repair. If he does not, but leaves her unrepaired until the end of the risk, no subsequent total loss intervening, then he is to be compensated as if he had repaired, only that the cost of the repairs he might have

(1) 2 Q. B. D. 501; 3 Q. B. D. 558; 4 App. Cas. 755.

made must be determined by estimate instead of by actual expenditure. This proposition is undoubtedly supported in terms by high authorities. "If the *damage done* to the ship has not been repaired, the *only* mode of ascertaining *its* amount is by the estimate of surveyors. Where, however, *the damage* has been repaired, the established mode of estimating *its* amount is, in case of wooden ships, to deduct one third from the whole expense, both of labour and materials which the repairs have cost, and to assess *the damage* at the remaining two thirds": Arnould on Insurance, part 3, c. 5, 5th ed. p. 901. He thus points out the mode of arriving at the amount of damage in either case, namely, where the ship has and has not been repaired. Then he applies one common mode of adjusting the loss. "The rule for adjusting a particular average loss on the ship is very simple, viz., that in open policies the underwriter pays the same aliquot part of the sum he has agreed to insure as *the damage* or the *expense of repairing it*, is of the ship's value at the commencement of the risk; in valued policies he pays the same proportion of the valuation in the policy": Arnould on Insurance, part 3, c. 5, 5th ed. p. 901. "The partial loss in this case" (says Lord Campbell in *Knight* v. *Faith* (1)), in which case the ship had not been repaired, "must be calculated on the same principles as if she had actually been repaired and proceeded on her voyage, or had foundered at sea without having been repaired soon after the policy expired." He admits the difficulty of proof in such cases of the amount of the damage, but says that it can be overcome. Willes, J., in *Lidgett* v. *Secretan* (2), seems to me to say elaborately the same thing. In none of the authorities such as Stevens, Benecke, Park, Marshall, Philipps, or Parsons, is any different rule suggested for fixing the amount of damage and adjusting the loss in the cases of the ship having been repaired or left unrepaired.

If this proposition, as to there being no different rule of ascertaining the amount of damage in the cases of actual repairs done and an estimate of repairs not done, is true, it seems to me to follow, that if the assured does not repair, and does not sell, and the accepted estimate for repairs equals or exceeds 100 per cent. of the sum insured, the principle adopted and approved in *Lohre*

(1) 15 Q. B. 649, at p. 670. (2) Law Rep. 6 C. P. 616.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Brett, L.J.

v. *Aitchison* (1) is equally applicable to such a case, as to the case in which repairs have actually been done. The only difference between the two cases is the mode of proving the amount of the damage. But mode of proof does not alter liability. In such a case then the assured would recover 100 per cent. of the sum insured, and the value of the unrepaired ship would not be taken into the account. It seems to me to follow that if the assured keep the ship unrepaired until the expiration of the time fixed in the policy, or, at all events until the day of trial, he may sell the ship the day after, and the proceeds of such sale cannot be brought into the account. The question in this case is whether if the sale takes place on the day before the one or the other event, the proceeds of the sale are to be taken into account. All the other propositions advanced in argument are answered by the preceding considerations. And as to this, the first observation which strikes me is, that if the assured after the accident, without repairing the ship, sell her and the policy with her, the assignee of the policy and ship repairs the ship and recovers on the policy for repairs actually done though they amount to 100 per cent. No inquiry would take place as to the amount realized by the original owner, whether he by comparison with the cost of the repairs had gained or lost by selling; the second observation is, that a distinction between a day before and a day after is too minute to have been treated as a distinction by business men; and the third, which seems to me, following the others, to be of immense force, is that none of the great masters who have dealt with the subject of the adjustment of an average loss on ship have in any way glanced at a different mode of adjusting such a loss if the ship should be sold before the adjustment or after it. Not one of them has ever alluded to such a rule as has been acted upon by Lindley, J., in this case. It is said that the circumstances of this case were never present to their minds. But it is inconceivable to me that Stevens, Benecke, Park, Marshall, Arnould, Phillips, Parsons, writing exhaustive treatises on Maritime Insurance, should all have overlooked the possibility of such a case arising. The more natural, the more just, conclusion seems to me to be that they knew but of one rule of

(1) 2 Q. B. D. 501; 3 Q. B. D. 550; 4 App. Cas. 755.

adjusting a partial or average loss on ship. It is said further, that the case has never been present to the minds of the great judges who have enunciated the rule of adjusting an average loss on ship. Is that possible? The circumstance has actually been before them in every case in which the shipowner or master has considered that the damage done to the ship amounted to a constructive total loss, and has thereupon sold her unrepaired, but the owner has failed at the trial to prove that there was a constructive total loss. In every such case, the owner has recovered as for a partial loss, and no different mode of calculating the loss from the ordinary mode has been suggested. The point was surely distinctly before Lord Campbell in *Knight* v. *Faith* (1), where the ship had been sold. And he thus in such a case lays down the rule (2): "However, if there has not been a total loss of the ship, actual or constructive with notice of abandonment, it lies upon the assured to shew the extent of the injury which the ship sustained from the accident, together with the sum which would be required for repairing it; and from this there would be the usual deduction of one-third new for old." It is not possible to my mind that so great a judge should not have added this caution, if the supposed rule existed: "provided that the proceeds of the sale of the ship must be deducted as she has been, in fact, sold by the master." But I will endeavour further to consider this matter. It seems to me that it can be solved by considering what it is against which the underwriter insures. It is true that the contract of insurance is a contract of indemnity, and that the assured must not be paid more than is sufficient to indemnify him against the loss which the underwriter by the contract of insurance has agreed to indemnify. But the question is what is the loss against which the contract indemnifies? Whatever the assured may gain or lose by the accident, by reason of matter outside the contract of indemnity, is not matter to be considered between the assured and the underwriter in settling the loss which is within the contract. As for instance, if the matter insured is marketable goods; suppose them bought for 100*l.* and insured for 100*l.*, and suppose the market to which they were to be carried is so gone down that if the goods arrived there they

(1) 15 Q. B. 649. (2) At p. 669.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Brett, L.J.

would sell for 50*l.*; if the goods are totally lost in the voyage, the underwriter must pay 100*l.*; the assured by reason of the accident is 50*l.* the better than he would have been if the accident had not happened. The fall of the market being a matter outside the contract of insurance is not a matter to be considered in adjusting the loss, and therefore the assured recovers the 100*l.* So if such goods upon such markets were in the voyage damaged to the extent of 75 per cent., the assured would be entitled to receive 75*l.*, and so would be the better by 25*l.* than if the accident had not happened. The question then is, what is the loss against which the underwriter agrees to indemnify? It is the loss which the assured intends to cover, and which the underwriter knows that the assured intends to cover. In the case of an insurance on marketable goods it is known to both that the object of the assured in conveying such goods from one place to another is that they may be sold at a profit. In order that such a result may ensue they should arrive and arrive undamaged. If they do not arrive at all, the assured is put in the same position as he was at the beginning of the adventure if he is paid the price at which he originally bought the goods. If the goods are damaged, he is put into that position by being paid a percentage of such price. The identity of the goods is immaterial to him. Goods for purchase and sale are exactly represented by money. But a ship is not in commerce treated by its owner as a subject of purchase and sale in either one market or another. It is used in commerce, as Arnould notices, by its owner as a machine for carrying cargo backwards and forwards for prices determined by successive contracts of affreightment. If the ship be totally lost, the only mode of indemnifying the shipowner, so as to place him in the position he was at the commencement of the risk, is to pay him the then value of the ship. But if the ship is damaged, the immediate business inconvenience and loss to the owner is not that a sale of the ship is thereby prevented or injured, but that he is prevented by reason of the damage from using the ship as a carrying machine to earn freight. That inconvenience is not to be cured by buying another ship, or by selling the damaged ship. A ship damaged in some distant port, in which she can be repaired, cannot be replaced by the purchase of another ship at

home. The business inconvenience to the shipowner, i.e., the loss in his business, can only be met by repairing the ship so as to make her as good a carrying machine as she was before. That is the object he desires to attain by the insurance. The loss he desires to cover, and which the underwriter knows he desires to cover, is therefore the cost of repairs, not the diminution in value of the ship to sell. The cost of repairs is therefore the matter to be indemnified. The loss in value to sell is not the loss against which the shipowner insured. The injury to or loss by a sale is no more within the purview of the contract of insurance on ship than is the loss of market in the case of an insurance on goods.

Loss or gain by a sale of the ship is, therefore, not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship. This seems to me the reasoning by which all writers on insurance, and all judges who have dealt with insurance, have laid down the one and sole rule which they have laid down for the adjustment of a partial or average loss on ship. And as was said in *Lohre* v. *Aitchison* (1), if this has been accepted as a sole and only rule by merchants and underwriters for many years, it is now a rule which is part of the contract of insurance on ship. According to that rule no evidence that the ship had been sold, or of what were the proceeds of the sale of the ship, is properly admissible in evidence in an action brought simply to recover a partial or average loss on ship.

As to the case of *Stewart* v. *Steele* (2) it seems to me, I confess, to be the most unsatisfactory case as reported, with which I have ever had to deal. Every observation made by the judges during the argument seems to shew that their minds were bent to the consideration of a case in which, after a partial damage, the ship is totally lost. In such case it is settled that partial damage actually repaired is to be paid for, but that repairs not done are not to be taken into account. Different reasons are given in the final judgments why the cost which would have been incurred if the wales had been replaced was not to be allowed. In simple truth, I do not gather the reason why such cost was disallowed.

(1) 2 Q. B. D. 501; 3 Q. B. D. 558; 4 App. Cas. 755. (2) 5 Scott N. R. 927.

[1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Brett, L.J.

No writer has ever deduced any rule from that case. The case was cited before Lindley, J., and before us from 5 Scott's N. R., for the purpose of relying on a supposed dictum of Maule, J., that "as to the supposed duty of the underwriters *to pay for the repairs*, that is a mere fallacy, and the frequent statement of the proposition will not make it more fallacious, the law casts no such duty upon them." The proposition so stated startled me exceedingly. Underwriters have for years paid for repairs. I felt certain it was not correct. And it is not true that Maule, J., stated such a proposition. What he did state is shewn in the report in the Law Journal. (1) He, in answer to an argument to the contrary, stated that the underwriters had no duty *to do the repairs to the ship*. That proposition has no effect on the solution of the present case, though it is most undoubtedly true. I would add that none of the terms on the face of the policy can help us to a solution of the present question, because, as is stated by Arnould, a policy on insurance in its present form is mainly construed according to long settled and admitted usage of merchants and underwriters. The defect in the judgment under review seems to me with deference to be that it has misapplied the doctrine that a contract of insurance is only a contract of indemnity. It is true that it must not more than indemnify against the loss which it covers; but it is also true that it has nothing to do with gains or losses which are outside the contract by which it undertakes to indemnify against the losses which it does cover. One is naturally startled at the facts of the present case; but they are wholly abnormal, and it is in my opinion most dangerous to mercantile business to tamper with a settled rule of adjustment of liability and claim in order to meet a case which will in all probability never happen again. I therefore am of opinion that this appeal and the plaintiffs' claim ought to be allowed.

COTTON, L.J. This is an action by the owners of a vessel insured by the defendants, and the only question on the appeal is the amount which the plaintiffs are entitled to recover on their policy. The vessel during the subsistence of the insurance was materially injured by perils of the sea. The repairs necessary to

(1) 11 L. J. (N.S.) C. P. 155.

make good the injuries were estimated at a large sum, and the owners at first claimed to treat the case as one of constructive total loss, but this was objected to by the insurers, and the owners abandoned this contention. They then began to repair the vessel at Moulmein but, instead of executing the repairs necessary to restore the vessel to as good a condition as before the injury was sustained, they had some of the most necessary repairs done at a comparatively trifling expense, and then during the continuance of the risk covered by the policy sold the vessel at that port. It realised a large sum, and the judgment of the Court below has given the plaintiffs only the difference between the value of the ship in its uninjured state and the sum realised by its sale, after deducting from this latter sum the cost of the repairs which were in fact done. The plaintiffs claim to be entitled to recover the estimated cost of the repairs necessary entirely to make good the injury sustained by the vessel less the usual allowance of one-third of the cost, which would give the plaintiffs a very much larger sum than they can recover under the judgment appealed from.

As a general rule where there is a partial loss in consequence of injury to a vessel by reason of perils insured against, the insured is entitled to recover the sum properly expended in executing the necessary repairs, or, if the work has not been done, the estimated expense of the necessary repairs, less in each case where the vessel was not at the time of the injury a new one, the usual allowance of one-third new for old. But in the present case the insured, before the determination of the risk, by their voluntary act shewed that they did not desire to restore the ship to the same condition as before the injury, and rendered it impossible that the repairs of which they seek to recover the expense should ever be executed by them. No doubt both judges and text-writers have spoken of the insured in a case of partial loss being entitled to recover the amount above-mentioned. But they do so without special reference to cases like the present on which there is no express authority. It therefore becomes necessary to consider the principle on which an insured shipowner is entitled to recover the above-mentioned proportion of the cost actual or estimated of repairs. A policy of marine insurance is a contract of indemnity. In case of partial loss when repairs are in fact executed, the sums expended

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Cotton, L.J.

in repairing the ship in a reasonable and proper way are damages sustained by the insured by reason of the perils insured against, and a natural consequence of such perils; and the insured is entitled by way of indemnity to the cost so incurred, after deducting in the case of a vessel not new at the time of the injury one-third of the expenditure, this deduction being made to prevent the insured getting a benefit by reason of his ship being repaired with new materials in place of old. Mr. Cohen argued that where the cost of repairing an injured vessel would exceed the value of the vessel when repaired, the expenditure could not be recovered from the underwriters. But it must not be supposed that by using the term "properly expended in repairs," I in any way accede to this argument. By properly expended in repairs I mean expended in executing the necessary repairs in a reasonable and proper manner.

Where in the case of a partial loss the owner has not repaired the vessel, he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against. This is the present case, and we have to determine on what principle this deterioration is to be ascertained. As a general rule the estimated cost of the repairs is the measure of deterioration, but to use the language of Maule, J., in *Stewart* v. *Steele* (1), "The insured must recover the expenses not eo nomine as expenses but as the measure of the loss." But it is urged by the appellants that the estimated cost of repair, with the deduction of one-third new for old in the case of ships not new, is the established and settled measure of damages to be recovered by an insured shipowner where there is a partial loss, and the ship has not been repaired. The judgment of Lord Campbell in *Knight* v. *Faith* (2) and the decision in *Lidgett* v. *Secretan* (3), have been relied on in support of this contention. In the former case the policy was a time policy for a year, and the ship sustained injury during the year by perils insured against, and after the expiration of the year was found to be in such a state as to be a constructive total loss, and was sold for a very small sum. The Court held the defendants not liable for the total loss, and

(1) 5 Scott, N. R. at p. 948. (2) 15 Q. B. 649.
(3) Law Rep. 6 C. P. 616.

undoubtedly in page 669 Lord Campbell speaks of the sum to be recovered by the plaintiffs for the partial loss as that which they could prove it would have cost to repair the injury sustained during the time covered by the policy. But there the plaintiffs had not before the expiration of the risk elected not to repair but to sell the ship, and the sum which the repairs would have cost was the only available measure of the deterioration at the expiration of the risk. In *Lidgett* v. *Secretan* (1) the vessel was insured by two policies. A partial loss was incurred during the period covered by one of the policies, and after that had expired and while the ship was being repaired, a total loss occurred by the ship being burnt during the period covered by the second policy. The Court decided that under the first policy the estimated cost of the repairs, which had not been done when the total loss occurred, was to be taken into account in ascertaining the amount recoverable under the first policy. Here again this was the only measure of the depreciation of the vessel by the injury sustained during the first policy. But the judges who decided that case do not say that the estimated cost of repairs not executed is necessarily in all cases to be taken as the measure; what they say is in principle against the appellants. Montague Smith, J., says (2), "The cost of the repairs would be *a* mode" (not *the* mode) "of estimating the amount by which the vessel was depreciated by striking on the reef," and Willes, J., says (3), "The only question we are asked to decide is what are the true principles upon which the loss is to be assessed? The true principle I apprehend to be this:—The owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk, the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of value at the expiration of the risk."

(1) Law Rep. 6 C. P. 616. (2) Law Rep. 6 C. P. at p. 622.
(3) Law Rep. 6 C. P. at p. 626.

1882

PITMAN v. UNIVERSAL MARINE INSURANCE CO.

Cotton, L.J.

These cases, in my opinion, do not help the appellants' contention, and the decision in *Stewart* v. *Steele* (1) is against them. There the ship had been injured and had in consequence of defects not caused by the perils insured against been sold for breaking up. The wales had been removed to ascertain the injury which the vessel had sustained, and were not replaced before the sale. The jury had given the shipowner the sum which it would have cost to replace the wales. But the Court held that on the evidence, as the ship was sold for breaking up, the plaintiffs were not damnified by the wales not having been replaced, and were not entitled to recover the sum which it would have cost to replace them.

The authorities therefore, in my opinion, do not support the contention of the plaintiffs that the estimated cost of repairs, less one-third new for old, is necessarily the measure of the sum to be recovered by the insured, and the reasoning and expressions used by the judges in the cases tend strongly to shew that the estimated cost of repairs which have not been executed is a method, but not under all circumstances the only method, of estimating the deterioration of the vessel. To hold that in the present case the insured is entitled to recover two thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases that the policy is a contract of indemnity, or to adopt the words of Willes, J., in *Lidgett* v. *Secretan* (2), the insured is not entitled to recover more than he lost by the injury sustained by the vessel through the perils covered by the policy.

In this state of the authorities, I am of opinion that the estimated cost of repairs, less the usual allowance of one-third new for old, is not under all circumstances the sum which the insured is to recover. Where, as in the present case, there is not a constructive total loss, he is not as against the insurers entitled to sell so as to bind them by the loss resulting therefrom; but when he elects to take this course, as in the present case, he, as against himself, fixes his loss, that is, he cannot as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. Probably, the most accu-

(1) 5 Scott, N. R. 927.

(2) Law Rep. 6 C. P. at p. 626.

rate way of stating the measure of what, under such circumstances, he is to recover, is that it will be the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale.

It was urged that the judge in the Court below had no sufficient evidence of what was the value of the vessel at Moulmein in its undamaged state. But this objection cannot, I think, be sustained, and as he found that this value was the same as that of the vessel at the commencement of the risk, the question as to the proper mode of estimating from the sale the depreciation of the vessel does not, I think, arise. It must be observed that in the present case some repairs had been done to the vessel before it was sold, and these have been allowed to the plaintiffs; for notwithstanding criticisms on the wording of the judgment, I think that it directs the cost of these repairs to be subtracted from the proceeds of the sale before these proceeds are deducted from the value of the ship when uninjured, so as to fix the amount of deterioration.

In my opinion the judgment appealed from is right, and the appeal must be dismissed.

Judgment affirmed.

Solicitors for plaintiffs: *Lyne & Holman.*
Solicitors for defendants: *Hollams, Son, & Coward.*

W. P.

1882
June 23.

CASSABOGLOU *v.* GIBBS AND OTHERS.

Principal and Agent—Commission Agent and his Principal, Relation between—Goods consigned not of Description ordered—Measure of Damages.

The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. The defendants upon such orders purchased and shipped to the plaintiff opium which they erroneously supposed to be of the description ordered, but which was really of an inferior description. The plaintiff sought to recover as damages in an action against the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendants, on the ground that the relation between the defendants as commission agents and himself was that of vendor and vendee of the opium:—

Held, that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered.

Affirmed on appeal 11 QBD 797

SPECIAL CASE.

The facts sufficiently appear from the judgment.

May 19. *Sir F. Herschell, S.G.* (*Pollard*, with him), for the plaintiff. The nature of the relation between the commission merchant and the merchant employing him in this country has been much discussed in several cases, particularly in the case of *Ireland* v. *Livingston*. (1) In the answer delivered by Blackburn, J., to the House of Lords in the latter case, he says: "It is quite true that the agent who in thus executing an order ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the persons supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall to the owner

(1) Law Rep. 5 Q. B. 516; Law Rep. 5 H. L. 395.

1882

CASSABOGLOU v. GIBBS.

of that wall, and just so does the property in the goods pass from the country producer to the commission merchant, and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other, and consequently the commission agent is a vendor, and has the rights of one as to the stoppage in transitu." The learned judge proceeded to point out that the contract between the commission agent and his correspondent is none the less a contract as between agent and principal. Both the relationships exist. There is the employment as an agent with the incidental obligation to use due skill and care, but quoad the goods when they are shipped the relation between the commission agent and the merchant becomes that of vendor and vendee: *Feise* v. *Wray*. (1) It is, therefore, contended that as vendor of the goods the commission agent is liable for the difference in value between the goods he contracted to supply and those actually sent.

[WATKIN WILLIAMS, J. In *Feise* v. *Wray* (1) it was held that where the commission agent had advanced his own money he was so far a vendor that he might stop in transitu, but it does not follow he is vendor for all purposes.]

The same reasoning ought to apply both with regard to his rights and liabilities.

[MANISTY, J. The claim here seems to be against him in his capacity of agent.]

The use of the word "agency" cannot deprive the plaintiff of any right the facts give him. It is contended that the measure of damages is the same regarding the contract as one merely of agency.

Cohen, Q.C. (*Anstie*, with him), for the defendants. It is admitted that the commission agent is liable for any actual loss resulting from his negligence. The defendants have paid into court on that basis. But the plaintiff's contention is, that he is entitled to be paid for profits which he could not have obtained if

(1) 3 East, 93.

1882

CASSABOGLOU v. GIBBS.

the agent had done his duty, and said that there was no opium of the sort ordered to be got. The cases cited only establish the proposition that as the commission merchant pays the price of the goods originally out of his own money, and transfers the property in the goods on shipment, he is in the position of what may be called a quasi vendor. He has a right to stop in transitu. It cannot in reason follow from this that he contracts as a vendor for all purposes. There is no further contract upon shipment of the goods; there is no consideration for any such contract. The point decided in *Ireland* v. *Livingston* (1) had no relation to the present question.

[He cited *Johnston* v. *Kershaw*. (2)]

Sir F. Herschell, S.G., in reply.

Cur. adv. vult.

June 23. The judgment of the Court (Manisty and Watkin Williams, JJ.) was delivered by

WATKIN WILLIAMS, J. This was a special case stated by consent of the parties for the opinion of the Court as to the measure of damages which the plaintiff was entitled to recover against the defendants under the following circumstances:—The plaintiff is a merchant in London. The defendants are commission agents at Hong Kong, having an agency in London. On the 23rd of March, 1880, the plaintiff inquired of the defendants by telegram at what price they would buy for him cases of the finest dry new crop Persian opium. The defendants replied to this, and on the 25th of March, the plaintiff gave them orders to buy for his account certain cases of the opium described and to have them shipped by mail steamer. About the 26th of March, 1880, the defendants purchased for the plaintiff what they believed, though erroneously as it turned out, to be finest dry new crop Persian opium, and on the 30th of March by letter advised the plaintiff of the purchase. On the 7th of April, 1880, the defendants forwarded to the plaintiff invoices of the opium, and advised him that they had drawn upon him for the amounts, viz., 1221*l.* 3*s.* 11*d.* and 2346*l.* 12*s.* The plaintiff duly accepted and

(1) Law Rep. 5 H. L. 395. (2) Law Rep, 2 Ex. 82.

paid these drafts. Upon the arrival of the opium in London it was discovered that no part of it was in accordance with the order, but it was soft and oily and unfit for the purposes to which the finest dry Persian opium is applicable. It is admitted for the purposes of this case that there was not in the market at Hong Kong any finest dry new crop Persian opium, and that the defendants could not have purchased any for the plaintiff. The plaintiff immediately rejected the whole of the opium and refused to accept it. The plaintiff having already sold a portion of the opium had to make an allowance to the purchasers of 170*l.* on account of the inferiority of quality. The remainder of the opium was sold at a lower price than that paid for it by the plaintiff. The plaintiff then brought this action against the defendants for compensation for his loss, and in clause 15 of the case, his claim is thus expressed:

"The plaintiff claims to be recouped or paid by the defendants the difference between the market price of the article ordered and the proceeds of the sale of the drug actually sent, as damages for the above-mentioned alleged breach of the contract of agency or alleged failure to perform at all the said contract, or alleged gross and culpable negligence as such agents in their conduct of such agency and performance of their duties in connection therewith, or as damages for the breach of warranty and promise to purchase alleged to be contained in the telegrams and letters. The defendants have paid into court the sum of 300*l.*, and the plaintiff admits that if the defendants are only liable to make good the loss actually sustained by him in consequence of the defendants' breach of duty the 300*l.* is sufficient to satisfy his claim, and the question is whether the plaintiff is entitled to claim for any loss beyond that amount."

We are of opinion that the plaintiff is not entitled to recover from the defendants anything beyond his actual loss. The plaintiff employed the defendants as his agents to purchase the opium for him, and their duty was to use due care, skill, and diligence in executing his orders, and for their failure in this respect they are liable to the plaintiff for all loss and damage sustained by him through their omission and negligence.

1882

CASSABOGLOU v. GIBBS.

The plaintiff seeks to treat them as vendors of the opium to him, and to hold them responsible for damages as for a breach of warranty of the kind and quality of the goods, in which case the measure of damages would be not merely the difference between the cost to him of the goods and their real value, but the difference between the value of goods of the description sold and of the goods actually sent. A single illustration is sufficient to shew the fallacy of the plaintiff's contention; suppose one instructs a commission agent to purchase for him a very valuable original picture if it should be offered for sale, and the agent carelessly bids for a picture under the belief that it is the original and it is knocked down to him for say 100*l.*, and he informs his employer that he has bought the picture for that sum and his employer remits the money and the picture is forwarded, but upon arrival is discovered to be merely a copy, the employer rejects the picture and it is sold for 90*l.* Now suppose that if it had been the original picture it would have been worth 1000*l.* Is the agent liable for 910*l.* damages, or only for the actual loss caused to his employer through his want of care and skill? It seems to us that the latter is the true measure of damages, and therefore that our judgment should be for the defendants.

Judgment for the defendants.

Solicitors for plaintiff: *Paines, Layton & Pollock.*
Solicitors for defendants: *Flux & Leadbitter.*

E. L.

JENNINGS *v.* HAMMOND.

1882
July 1.

Company—Illegality—Unregistered Association of more than Twenty Members —Loan Society—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4—*Association having for its Object the acquisition of Gain.*

Persons to a number exceeding twenty had formed themselves into a society called the "Ipswich Mechanics Mutual Benefit Society." From the rules of the society it appeared that there were four hundred shares in the society of 10*l.* each, and that no member could hold more than twenty shares. The object of the society was to raise by monthly subscriptions and payments payable by the members in respect of their shares a fund for the purpose of making advances to members. From time to time as soon as the fund in hand amounted to a certain sum it was put up for sale by auction amongst the members, the highest bidder receiving the amount on loan from the society at interest. No member could receive on loan more than the nominal amount of the share or shares held by him, but ultimately every member, who did not withdraw his share under the rule providing for such withdrawal, was to have advanced or allotted to him out of the funds accruing to the society the sum of 10*l.* for every share held by him. The society was not registered under the Companies Act, 1862:—

Held, that the society was illegal by reason of the provisions of the Companies Act, 1862, s. 4, which prohibits the formation of any company, association, or partnership consisting of more than twenty persons for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless registered as a company under the Act:

Held also, that a promissory note given by a member to the trustee of the society to secure a sum of money advanced to such member under the rules of the society was invalid, and no action could be maintained thereon.

APPEAL from the decision of the judge of the Suffolk county court.

The facts sufficiently appear from the judgment. The judge nonsuited the plaintiff, and a rule nisi for a new trial on the ground of misdirection having been obtained,

June 20. *Laxton*, shewed cause. This society clearly comes within the prohibition of 25 & 26 Vict. c. 89, s. 4. It carries on the business of lending money for the acquisition of gain by the members, and it is immaterial that the business is carried on among the members themselves: *In re Padstow Total Loss and*

1882

JENNINGS v. HAMMOND.

Collision Assurance Association. (1) Moreover, in certain events the funds may by the rules be lent to other similar societies at interest. The intended result of the operations of the society must be gain to the members.

[He also cited *Bear* v. *Bromley* (2); *Smith* v. *Anderson* (3); *Sykes* v. *Beadon* (4); *De Begnis* v. *Armistead.* (5)]

Poyser, supported the rule. The case of *In re Padstow Total Loss, &c., Association* (1) does not govern the present. The decision there was that the association being prohibited by the Act could not be wound up after the manner of a legal company; the law would not regard or treat it as an association. Assuming that this society is as a society illegal, yet there is nothing illegal in this transaction so as to prevent the individual to whom the note has been given from suing upon it to recover money lent. It is submitted however that this society is not a society carrying on business within the meaning of 25 & 26 Vict. c. 89, s. 4. The section contemplates the carrying on of some business in the ordinary mercantile sense. This is an association the primary object of which is the saving of money by mechanics. It is analogous to a benefit building society. It is contended that the case is governed by the decision in *Smith* v. *Anderson.* (3)

Cur. adv. vult.

July 1. The judgment of the Court (Field and Cave, JJ.) was delivered by

CAVE, J. This is an action brought by the plaintiff against the defendant to recover the balance remaining unpaid on a promissory note for 10*l.* made by the defendant in favour of the plaintiff. At the trial the defendant admitted that the signature to the note was his, but set up as a defence that the plaintiff had no beneficial interest in the note or the money claimed in the action, but was suing only on behalf of and as trustee for the Ipswich Mechanics Mutual Benefit Society, by which society the

(1) 20 Ch. D. 137.
(2) 18 Q. B. 271.
(3) 15 Ch. D. 247.
(4) 11 Ch. D. 170.
(5) 10 Bing. 107.

money had been lent to the defendant, and which it was alleged was an association formed contrary to 25 & 26 Vict. c. 89, s. 4.

That section enacts that "no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under that Act." There are three points for our consideration: 1st, whether the society in question is an illegal association within the Act. If it is so, then, 2ndly, whether the society could have recovered in an action if they had lent the money and taken the note in the names of the individual members; and if they could not, 3rdly, whether the plaintiff can sue as a trustee for them. From the rules and regulations of the society it appears that certain persons exceeding twenty in number, whose names were inserted in the book of the society containing the number or amount of their respective shares, had agreed to become members of the society, and had for their mutual benefit raised by subscription a sum of money, and had agreed by further monthly subscriptions and payments to raise further sums of money, all the money so raised having been raised with the intention of afterwards lending or advancing the same to such members of the society as should be entitled to receive the same under the rules thereof, on such security as should be approved by the committee, at interest at the rate of 5 per cent., in the proportions in such manner and under such regulations as were contained in the rules, so that ultimately every member of the society who should not withdraw his share under the rule to that effect should have advanced or allotted to him the sum of 10*l.* for every share he should hold therein. It further appeared that there were 400 shares of 10*l.* each, of which no member could hold more than twenty. Each member pays a monthly subscription, and when these subscriptions amount to the sum of 5*l.*, such sum is put up for sale and the highest bidder is the purchaser and receives the 5*l.* on loan at interest at the rate of 5 per cent., subject to the proviso that no member can receive on loan more than the nominal amount of his shares. Should there be no bidders for the loans the money in hand may be allotted by ballot, or the

1882

JENNINGS v. HAMMOND.

committee elected annually by the members may, if they think fit, lend the money to other similar societies at the rate of 5 per cent. repayable on demand.

By rule 14 it was provided "that a trustee be appointed for this society in whose name alone all securities shall be made and taken, and by whom or in whose name all actions or other proceedings shall be commenced for the recovery of any of the funds, securities, books, or other papers of or belonging to the society: and the society shall have power at any time to displace him from his office without notice—that such trustee shall be allowed to resign his office whenever he shall think fit so to do, he giving two months previous notice of his intention to the secretary of the society for the time being; but he shall be fully reimbursed all damages, costs, and expenses which he shall sustain or in any manner incur by reason or in consequence of such appointment, and that such trustee shall permit his name, and upon his decease the names of his executors and administrators, to be used in any proceedings to be taken by him or them in any matter relating to the society, and that he or his executors or administrators shall not at any time release nor become nonsuit in any action or actions that may at any time become commenced or prosecuted in his or their name or names, or do any act to delay or protract such action or other proceeding, and shall on his removal from or resignation of the said office of trustee of the said society forthwith deliver over to such person as the committee shall appoint all and every the papers, securities, or documents in his custody relating to the said society."

The defendant in this action is a member of the society, and has received a loan of 10*l.* pursuant to the rules, in order to secure which the promissory note sued on was made by him and given to the plaintiff, the trustee of the society, who, in accordance with the rules, brought this action to recover the amount remaining unpaid on the note.

We are of opinion that this case is governed by *In re Padstow Total Loss and Collision Assurance Association.* (1) There is here an association of more than twenty persons formed for the purpose of carrying on the business of money lending, such business clearly

(1) 20 Ch. D. 137.

having for its object the acquisition of gain by the individual members thereof. It is true that the business of the association is not to lend money generally, but, primarily at least, only to members of the association; but the case cited above shews that that makes no difference. Those members of the association who are anxious to obtain loans will bid against one another for the money which is put up for sale in accordance with the rules, and the purchase-money will be the source of gain to the individual shareholders. The association is, therefore, one which is forbidden by the 4th section of 25 & 26 Vict. c. 89.

If, as we hold is the case, the association is forbidden by the Act in question, it follows that all contracts made directly for the purpose of carrying on the business of the association are illegal. In this case the business of the society is to lend money, and consequently the loan to the defendant was made in pursuance of an illegal object, and the note sued on was given for an illegal consideration, and cannot be sued upon either by the society or by any one suing as a trustee for the society, or even by any one suing for his own benefit if he took the note with a knowledge that it was given for an illegal consideration.

The judgment of the county court judge therefore was right, and the appeal must be dismissed with costs.

Rule discharged.

Solicitors for plaintiff: *Aldridge, Thorn, & Morris.*
Solicitor for defendant: *A. A. Watts.*

E. L.

1882
April 4.

BROWN *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Railway—Carrier—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Alternative Rates—Special Condition excluding all Liability.*

The plaintiff, a fish merchant, signed a contract by which, in consideration of the defendants, a railway company, carrying his fish at a rate one-fifth less than the ordinary rate, he agreed to free the defendants from "all liability for loss or damage by delay in transit or from whatever cause arising." Owing to pressure of business the fish of the plaintiff and others was some hours late in starting, and reached London too late for the market:—

Held, that, as the defendants carried at alternative rates, the condition was just and reasonable, although it was absolute and contained no exception, and would in the absence of alternative rates have been unjust and unreasonable.

Reversed on appeal 10 Q.B.D. 150 C.A. (1)

APPEAL on Special Case stated by the county court judge at Great Grimsby, the material facts of which were as follows:—

The plaintiff was a fish merchant carrying on business at Great Grimsby, and had for some years been in the habit of delivering to the defendants consignments of live codfish to be carried to London for the Billingsgate Market. The practice was to stun the fish before they were fetched away by the company's servants; and that they should in the ordinary course be despatched from Great Grimsby by the mail train at 8.13 P.M., or by the fish train at 8.40 P.M., so as to reach Billingsgate before the opening of the market at 5 A.M.

On the 28th of December, 1880, the plaintiff signed the following "risk note":

"Manchester, Sheffield, and Lincolnshire Railway.

"Risk Note.

"Grimsby Docks Stations, 28th Dec., 1880.

"Mr. Henry Brown.

"'Fish Traffic.'

"Sir,—I beg to inform you that to parties willing to free and relieve this company and the other railway companies over whose lines fish may be forwarded from any of our stations from all liability for loss or damage by delay in transit or from whatever other cause arising, the company agree that the rates charged

(1) But restored by H. of L. Ball. Cas. [illegible]

will be one-fifth lower than where no such undertaking as the annexed is granted.

"I am, Sir,

"For and on behalf of the company,

"Your obedient servant,

"JAMES REED."

"28th Dec., 1880.

"Sir,—In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

"This undertaking to remain in force from the present date until the 31st of December, 1885.

"I am, Sir,

"Your obedient servant,

"HENRY WILLIAM BROWN.

"Mr. Reed,

"Grimsby Docks Station,

"M. S. & L. Railway Company.

"Witness, W. H. WATKINSON."

The whole of the risk note, excepting the signatures, date, and address, is a lithograph form supplied by the defendants.

On the 13th of April, 1881, two days before Good Friday, the quantity of fish delivered by the merchants at Great Grimsby to the defendants for carriage was very large, and in excess of any previous year at the same season; but the defendants did not refuse to accept any consignments or make any special provision, except by engaging additional men to load the fish, for sending off the live fish for Billingsgate, so that it should arrive in time for the market; nor did they give any warning of the state of matters to the plaintiff. The plaintiff therefore stunned his fish, and packed them ready to be hauled away by the defendants and despatched to London.

The plaintiff's fish were despatched by a special fish train at 3.25 A.M. on the 14th of April instead of by the 8.40 P.M. on the 13th; they were therefore too late for the Billingsgate Market; and it was agreed that the plaintiff thereby suffered a loss of 1*l*.

1882

BROWN v. MANCHESTER AND SHEFFIELD RAILWAY CO.

The plaintiff's fish might have been despatched at the ordinary time had all the vans for London been drawn from out of the general mass of trucks and vans laden with fish standing ready for despatch to all parts of the country; but to have taken this course would have still further delayed the despatch of all the other fish trains, and would have caused additional expense to the defendants.

The county court judge held that the defendants had failed to justify the delay, and that they were not protected by the risk note, but he stated a special case.

It was admitted during the argument that there was a published legal rate, having no conditions attached to it, which left the company liable as common carriers.

Gully, Q.C. (*C. A. Russell*, with him), for the defendants. There was a reasonable alternative put before the plaintiff, and the consignment note was the contract which those desirous of having the benefit of the reduction of one-fifth signed. Where there are alternative rates, the condition exempting the carrier from liability when carrying at the lower rate is just and reasonable: *Lewis* v. *Great Western Ry. Co.* (1); although where no option whatever is given to the sender such a condition is held to be unreasonable: *Rooth* v. *North Eastern Ry. Co.* (2)

[He also cited *Peek* v. *North Staffordshire Ry. Co.* (3); *Ashenden* v. *London, Brighton, and South Coast Ry. Co.* (4); *Simons* v. *Great Western Ry. Co.* (5)]

Cyril Dodd (*Webster, Q.C.*, with him), for the plaintiff. The fact of there being an alternative rate does not make a condition just and reasonable which in itself is unjust and unreasonable; here the condition is unlimited, there being no exception even for wilful misconduct; such a condition has never yet been held reasonable. The defendants relied on *Glenister* v. *Great Western Ry. Co.* (6) at the trial; but the condition in that case expressly excepted wilful misconduct. No reasonable alternative has been offered to the plaintiff, but only an option between the parlia-

(1) 3 Q. B. D. 195.
(2) Law Rep. 2 Ex. 173.
(3) 10 H. L. C. 473.
(4) 5 Ex. D. 190.
(5) 18 C. B. 805.
(6) 29 L. T. (N.S.) 423.

mentary rate, which any one can have, and the rate relieving the defendants of all liability; this is no real option; there must be an option of something better than the parliamentary rate.

Secondly, not starting is not a "delay in transit," and is therefore not covered by the condition.

[He also cited *McManus* v. *Lancashire and Yorkshire Ry. Co.* (1); *Allday* v. *Great Western Ry. Co.* (2)

MATHEW, J. The only point which it is necessary for us to consider is, whether the liability of the defendants has been extinguished by the terms of the special contract. If that contract stood alone, probably there would be no doubt that it would be unreasonable. It is in form a letter sent to the customer, and assented to by him. [The learned judge here read the contract.] The difficulty suggested itself to us that the facts given in evidence and those contained in the case did not disclose what were the other rates referred to in the document. Thereupon counsel very properly agreed to the effect that there were certain public legal rates available to the customers of the defendants, and that customers who sent goods at those rates had no conditions imposed upon them in restriction of the defendants' liability, the defendants remaining liable as common carriers. The customer could, in fact, have demanded that the defendants should carry as common carriers, and be liable to all the risks attached to such carriage. But the defendants proposed to the plaintiff the terms which I have read, and, in consideration of his accepting those terms, agreed to carry his goods at one-fifth less than the rate which they would otherwise have charged; and to these terms the plaintiff agreed. The meaning of the agreement seems to me perfectly clear, although Mr. Dodd used considerable ingenuity in endeavouring to shew that it meant something entirely different. The question for us is whether that agreement is reasonable or not; and there are many facts in the case which are elements for us to consider in determining that question, and which are evidence of the reasonableness of the agree-

(1) 4 H. & N. 327. (2) 5 B. & S. 903.

1882

BROWN v. MANCHESTER AND SHEFFIELD RAILWAY CO.

ment. In the first place, it is clearly made out that the plaintiff, the customer, had an alternative; he was not compelled to send at a certain rate. Secondly, he, being a fish merchant, entered into an agreement affecting his business, and it is found that all dealers in fish are in the habit of entering into similar agreements. Further, the plaintiff admitted that he had made a considerable saving by sending his fish at this rate, and that he knew what were the ordinary rates and the advantages of the lesser rate. It is, therefore, a question of fact whether the condition is reasonable or not, and in my judgment it is reasonable. I wish to add that although the damage in the present case arose from delay in starting the train from the forwarding station, I am clearly of opinion that such damage comes within the meaning of "damage caused by delay in transit."

CAVE, J. I am of the same opinion. The only question is whether the condition is just and reasonable. There is some difficulty in understanding what "just" means, and I construe it in a sense favourable to the sender by making it depend on the question whether the contract was to his advantage. I think it clear that the Railway and Canal Traffic Act contemplates that there may be a condition exempting the carrier from all liability, which nevertheless may be just and reasonable; and the justice and reasonableness of the condition depend on what the sender gets in exchange for the company's liability as common carriers which he gives up. If there were only one rate, and the condition were that the company would not be answerable at all, such a condition would be unjust. But that is not the present case. Here the sender has the alternative and option offered him of sending his goods at the ordinary rate and on the ordinary terms as to liability, or of sending them at a reduction of one-fifth, which is offered him on condition of his freeing the company from all liability. Is it expedient for him to accept this offer? If it is, we cannot say that it is unjust or unreasonable. We are not, indeed, to consider whether it is expedient for the company; the legislature contemplates that a railway company can take care of itself. But is it expedient for the sender? On this point we have as strong evidence as can be asked for. The plaintiff, a man of

business, with a pecuniary interest in getting his fish to market to his own greatest advantage, thought it to his advantage to accept the company's offer, and to take a reduction in the rate of carriage rather than keep to the ordinary rate and liability. In my opinion the condition was just and reasonable.

Dodd asked for leave to appeal, which was granted.

Judgment for the defendants, with costs.

Solicitors for plaintiff: *Rollit & Sons, for Rollit & Sons, Hull.*

Solicitors for defendants: *Cunliffe, Beaumont, & Davenport, for R. Lingard Monk, Manchester.*

J. R.

BABBAGE *v.* COULBURN. *March 9.*

Landlord and Tenant—Furnished House—Agreement to deliver up House and Furniture and pay Sum for Damage to be ascertained by Valuers—Condition Precedent.

Where by a written agreement a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house and the furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment if disputed to be settled by two valuers, the settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations.

THE plaintiff, by agreement in writing, let to the defendant a furnished house with garden at a certain rent, and the defendant agreed, inter alia, "to keep, and at the expiration of his tenancy, to quit and deliver up quiet and peaceable possession of the residence, gardens, and grounds, with the furniture and effects, in accordance with the inventory aforesaid, in as good order, state, and condition as the same are on his taking possession (reasonable use and wear and accidental damage by fire, storm, or tempest only excepted), and in the event of any loss, damage, or breakage, otherwise than herein provided for, the same to be made good or paid for by the tenant, the amount of such payment, if in dispute, to

1882

BABBAGE v. COULBURN.

be referred to and settled by two valuers, one to be appointed by the landlord and the other by the tenant or their umpire in the usual way." After the determination of the defendant's tenancy, the plaintiff employed a surveyor to ascertain the amount of dilapidations, which the surveyor fixed at 13*l.* 15*s.* The plaintiff brought an action to recover this sum and the expenses of the surveyor and the balance of the rent remaining unpaid. The rent was paid into court, but as regarded the claim for dilapidations, the defendant pleaded that the ascertaining of the amount in the manner provided for by the agreement was a condition precedent to the plaintiff's right to sue. The issue was sent for trial in the Westminster county court under s. 26 of the County Courts Act of 1856 (19 & 20 Vict. c. 108). The county court judge decided in favour of the defendant. The plaintiff obtained a rule nisi for a new trial.

Swinfen Eady, shewed cause. This case is within the principle of *Scott* v. *Avery* (1); there are not two separate and independent stipulations. The agreement is to pay such a sum for damage as the valuers should award. *Dawson* v. *Fitzgerald* (2) will be relied on by the other side, but is distinguishable; in that case there was one covenant not to keep an excessive number of rabbits, and a separate covenant that, if he did, the defendant would pay a fair and reasonable sum as compensation, to be ascertained in a certain way.

W. H. Clay, in support of the rule. *Dawson* v. *Fitzgerald* (2) is in point. There is here an agreement to deliver up the premises in good order, and a subsequent and separate agreement to refer, and an action is maintainable for breach of the former.

FIELD, J. This rule must be discharged. I think that the county court judge was right in holding that the action was not maintainable until the amount of the payment for damage had been ascertained by two valuers or their umpire. We have only to find out the intentions of the parties from the language used by them, as, in the construction of wills, we must look at the language of the particular will. In a furnished house other than

(1) 5 H. L. C. 811. (2) 1 Ex. D. 257.

reasonable damage by wear and tear will happen, and such contingencies should be provided for by the landlord and tenant. There may of course be an absolute and positive covenant not to do an act, as there was in *Dawson* v. *Fitzgerald* (1); but in the present case I think there was no such independent covenant. I agree with the reasoning of Bramwell, B., in his judgment in *Dawson* v. *Fitzgerald* (2) in the Court below; but in that case the result was different, because there was an independent covenant to pay a fair and reasonable compensation, while here there is only a covenant to pay a sum ascertained by valuers.

HUDDLESTON, B. The question in all these cases is whether or not there are separate and independent covenants; a covenant that an act shall or shall not be done, and a covenant to refer. Here the defendant agreed to deliver up the furniture in a certain condition, and agreed, not independently to refer, but to deliver up the furniture and pay any sum awarded by the valuers. The rule must be discharged.

Rule discharged, with costs. (3)

Solicitors for plaintiff: *Freeman & Bothamley.*
Solicitor for defendant: *C. F. Emmott.*

(1) 1 Ex. D. 257. (2) Law Rep. 9 Ex. 10.
(3) Affirmed on appeal, May 8.

J. R.

1882

March 28.

DAVIES, APPELLANT; EVANS, RESPONDENT.

Bastardy—Affiliation Order—Arrears—Discretion of Justices to enforce Payment—7 & 8 Vict. c. 101, *s.* 5—*35 & 36 Vict. c.* 65, *s.* 4.

By 7 & 8 Vict. c. 101, s. 5, all money payable under a bastardy order "shall be due and payable to the mother of the bastard child in respect of such time and so long as she lives. . . ." By 35 & 36 Vict. c. 65, s. 4, if it be made to appear to any one justice that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant, cause the putative father to be brought up before any two justices, and in case he neglect or refuse payment they may by warrant direct the sum to be recovered by distress, and may detain him until the return to the warrant of distress; but if on the return, or by admission, it appear that no sufficient distress can be had, they may, if they see fit, cause him to be committed:—

Held, by Grove, J., that the enforcement by the justices of the payment of sums due under such order is discretionary. By Huddleston, B., that the justices are bound to enforce it.

CASE stated by justices of Cardiganshire under 20 & 21 Vict. c. 43, and the Summary Jurisdiction Act, 1879, s. 33.

The Case originally stated set forth the material parts of a bastardy order in the usual form for the payment by the respondent as the putative father of a bastard child to the appellant, the mother of the child, of the sum of 2*s.* 6*d.* per week, and alleged that it was admitted that 7*l.* was in arrear and had not been paid to her, although the respondent was able to pay, and that the appellant since the making of the order had become the wife of John Davis, and that she was still living with him as his wife and that he was able to maintain the child. The question then raised for the opinion of the Court was, whether the order of justices could be enforced against the respondent by distress or committal to prison, as the appellant had resided with her husband and he was able to maintain the child.

The present Further Case recited that the Case originally stated came on for argument before the Court on the 29th of November, 1881, and upon the hearing it was ordered that the order of the justices could be enforced against the respondent by distress warrant or committal to prison under the circumstances, but that if the justices had intended to ask the Court whether they, the justices, were bound to enforce the order by distress warrant or

committal, or had any discretion in the matter, they were to return the case to the Court amended by the addition of that question.

1882

DAVIES v. EVANS.

The justices submitted for the further opinion of the Court the following question: Whether the justices were bound to enforce the order against the putative father of the bastard child by warrant of distress or committal, or whether they had any discretion in the matter.

Willis Bund, and *W. Evans*, for the appellant. By 7 & 8 Vict. c. 101, s. 5, all money payable under any bastardy order "shall be due and payable" to the mother of the bastard child; and the proviso that no order shall be of any force after the marriage of the mother is repealed by 35 & 36 Vict. c. 65 (the Bastardy Law Amendment Act, 1872), Sched. 1. By s. 4 of that Act, if any sum due under the order is unpaid a justice may issue a warrant to apprehend the putative father, and two justices may direct the sum to be recovered by distress, and in default of distress may, if they see fit, imprison him. The justices must enforce the order, they have only a discretion as to the mode of enforcement. "The word 'may' is capable of different constructions, and has in certain cases been construed as meaning 'must':" per Field, J., in *Reg.* v. *Barclay*. (1) It should be so construed in s. 4.

The respondent did not appear.

HUDDLESTON, B. I am of opinion that the justices are bound to enforce the order, and either to issue a warrant of distress, or, in default of distress, a warrant of commitment. I think this point has been already decided in *Hardy* v. *Atherton* (2), in which my Brother Hawkins and I came to the conclusion that the justices had no discretion to refuse to enforce the order, I saying "I think the justices have no such discretion as has been suggested;" and I came to that conclusion on the words of the Act and after taking fully into consideration the observations of Lush, J., in *Stacey* v. *Lintell* (3) and of Field, J., in *Sotheron* v. *Scott* (4), which were commented upon in our judgments. [The learned judge referred to them.] My Brother Hawkins agreed with me, and evidently

(1) 8 Q. B. D. 306, 312.
(2) 7 Q. B. D. 264.
(3) 4 Q. B. D. 291.
(4) 6 Q. B. D. 518.

1882

DAVIES v. EVANS.

Huddleston, B.

did not agree with the remarks made by Lush, J., in *Stacey* v. *Lintell.* (1) *Hardy* v. *Atherton* (2) is I think conclusive. But, if the question is to be reopened, I again say that it is clear from the words of the statute that the justices had no discretion to refuse enforcement of the order. Originally an affiliation order was made in relief of the parish. The payment was made to the overseers of the poor for the maintenance of bastard children. But under 7 & 8 Vict. c. 101, the order is made in favour of the mother and in relief of the burden cast on her. 7 & 8 Vict. c. 101, s. 5, enacts that "all money payable under any order as aforesaid shall be due and payable to the mother of the bastard child in respect of such time and so long as she lives and is of sound mind, and is not in any gaol or prison, or under sentence of transportation." That enactment remains in force. By 35 & 36 Vict. c. 65, s. 4, a power is given to make such a bastardy order, but there is no provision that the money payable under it "shall be due and payable" to the mother. But then we look back to 7 & 8 Vict. c. 101, s. 5, and find that the sum ordered "shall be due and payable" to the mother so long as she lives and is sane and at liberty. How is that order to be enforced? 35 & 36 Vict. c. 65, s. 4, says in substance, that two justices may by warrant direct the sum to be recovered by distress and sale of the goods of the putative father, and may order such putative father to be detained until return to the warrant, but if, on the return of the warrant or on his admission, it appear that no sufficient distress can be had then two justices may commit him to gaol. They may issue a warrant of distress or may imprison. "May" should be read "must." Numerous authorities shew that this may be done under some circumstances: see *Bell* v. *Crane* (3), per Blackburn, J., *Reg.* v. *Barclay* (4), *Reg.* v. *Boteler* (5), and other cases, and when the effect is to carry out the object of the statute it is reasonable to read the word "may" as "must." What is the object of this statute? Clearly the mother is to be relieved of the support of the child to the extent specified in the Act. She is to have the money paid to her while alive and of sound mind and out of prison. She is to

(1) 4 Q. B. D. 291.
(2) 7 Q. B. D. 264.
(3) Law Rep. 8 Q. B. 481, 482.
(4) 8 Q. B. D. 306.
(5) 4 B. & S. 959.

have it although she marries another man, and whether her husband is able to support the child or not: *Sotheron* v. *Scott* (1); *Hardy* v. *Atherton*. (2) Then how is the money to be recovered? It is idle to say that she is to bring action after action in the county court for each weekly sum due and unpaid. The legislature intended that there should be a summary power of enforcing payment by distress or imprisonment. If so there is no difficulty in reading the word "may" as "must" and rendering the whole Act effective. I think the justices have no discretion to refuse to enforce payment under the order. Were it otherwise great hardship would follow. There is an appeal from the order to quarter sessions where the whole matter may be reopened, but if the power given to the justices to enforce the order were discretionary there would be practically a rehearing on every occasion when the mother asks them to enforce the order.

GROVE, J. I am sorry to be unable to agree with my Brother Huddleston in construing this enactment as imperative.

If I thought that *Hardy* v. *Atherton* (2) was a decision of the Court on the present question, I should have felt myself bound by the judgment whatever my own opinion might be. But the opinion of my learned Brother in that case on the point now before us, was an obiter dictum not necessary to the decision of the case. The head-note states that "an order obtained by a single woman for the maintenance of a bastard child, can be enforced against the putative father after the marriage of the mother, although her husband is able to maintain the child." With that I agree. I gave the same judgment on a case before my Brother Lopes and myself. The case in *Hardy* v. *Atherton* (2) stated that the justices being of opinion that, as the appellant had married, her husband was responsible for and capable of maintaining and educating the child, and the order could not be enforced so long as the appellant was a married woman whose husband was capable of supporting the child, dismissed the information and complaint. There I think the justices were wrong. The only question for the opinion of the Court was—not whether it was compulsory on the justices to enforce the order, but—whether the order could be enforced. Huddleston, B., indeed said, "I think the justices have

(1) 6 Q. B. D. 518. (2) 7 Q. B. D. 264.

1882

DAVIES v. EVANS.

Grove, J.

no such discretion as has been suggested." Hawkins, J., said that the observations of Lush, J., in *Stacey* v. *Lintell* (1) as to the discretion to enforce the order were "not necessary to the decision of that case, and do not purport to be the result of deliberate reflection," and as to the remarks made by Field, J., on the same subject in *Sotheron* v. *Scott* (2), my Brother Hawkins said, "I do not understand those remarks to be intended to intimate any hostile opinion to that which I have arrived at. In the result, I am of opinion that the order can be enforced, notwithstanding the marriage of the appellant and the ability of her husband to support the child." I am of the same opinion. I think this order can be enforced, but the justices have asked a question other than that asked in *Hardy* v. *Atherton*. (3) If I were asked what they ought to do, I might answer that they should enforce the order. But I think I should reply that they ought to make further inquiry—not merely whether the husband was able to maintain the child, but—whether he was willing to support the child and to adopt it, and also as to the conduct of the wife, and many other facts. In numerous cases the enforcement of the order might be productive of great hardship. Suppose the order were wrongly made, and the putative father were not the real father of the child, and the mother were an abandoned woman, yet the order would stand; are the justices in such case, although the mother has a husband able and ready to support the child, and although if all the facts had been before them they would have made a different order, bound for thirteen years to enforce the order? I think that they are not. The general canon of construction is stated in *Reg.* v. *Barclay* (4) by Field J., who says, "It is a very well established rule for the construction of statutes, that if they impose a charge on the subject, they must be strictly construed as against the party in whose favour the charge is imposed." Adapting that rule to the present case, the charge is on the putative father, and in favour of the now married woman, therefore the statute should be construed against the mother in whose favour the charge is imposed. So applying the canon to s. 4 of the Act, it seems clear to me that the word "may" must not be construed "shall." When a statute declares that something

(1) 4 Q. B. D. 291.
(2) 6 Q. B. D. 518.
(3) 7 Q. B. D. 264.
(4) 8 Q. B. D. 306, at p. 312.

"shall" be done, the language is considered imperative, and the thing must be done; where the word "may" is used, the language is as a general rule permissive. No doubt in many cases the phrase "shall and may be lawful," has been construed as imperative by the Courts, having regard to the object of the provision and to the context and the rule above-mentioned, and it seems that they have so construed the word "may" standing alone as in *Reg.* v. *Barclay.* (1) But must we so construe it here? The word "may" is used in the same section several times. But it is used after the word "shall" is used; not merely in this section, but in the previous s. 3 where there is a provision that if the application to a justice for a bastardy order be made before the birth of the child, "the woman shall make a deposition upon oath, stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session." There the words are clearly imperative. The framer of the Act evidently knew what words to use when he intended it to be imperative. So in s. 4 the justices "shall" hear the evidence of the woman, and "shall" also hear any evidence tendered by the alleged father—the language thus far is clearly imperative—and they "may" adjudge the man to be the putative father of such bastard child. Why is that change of expression? The reason of it seems to me plain. They shall do their duty as justices. They "shall" hear the evidence on both sides, and if the evidence of the woman be corroborated they may make an order, but are not obliged to do so, for they may not believe the testimony given in corroboration; "And they 'may' also, if they see fit . . . make an order on the putative father for the payment of a sum of money weekly." There too the language is permissive, and "such weekly sum 'may,' if the said justices think fit, be calculated from the birth of the child." There again the same permissive word is repeated, "And if . . . it be made to appear to any one justice . . . that any sum to be paid in pursuance of such order has not been paid, such justice 'may' by warrant . . . cause such putative father to be brought before any two justices," and in case he neglect or refuse payment, "such two justices 'may" by warrant . . . direct the sum to be recovered

(1) 8 Q. B. D. 306.

1882

DAVIES v. EVANS.

GROVE, J.

by distress, "and 'may' order such putative father to be detained until return can be conveniently made to such warrant of distress." Why is the word "may" there to be construed as imperative when it is admitted to be only permissive in the many other places where it is used throughout the section? Why must I strain the word in one place and give its ordinary meaning to it in all the others? Why if the enactment was intended to be imperative, does it not declare that the justices "shall" by warrant cause the putative father to be brought up, and the sum to be recovered by distress? But further, the section proceeds "if upon the return of such warrant, or if by admission of such putative father, it appears that no sufficient distress can be had, then any such two justices 'may,' if they see fit," by warrant commit him to goal. That again, it is said, may be permissive. So that the word 'may,' which is used about half-a-dozen times, is, according to the argument for the appellant, permissive in five cases and imperative in only one. I can see no reason for such a construction. I suppose the object of ordering imprisonment is to get the money for the woman, and not to punish the man for that which is not a criminal offence. I think it would be dangerous to put on the same word, occurring frequently in the same section, different constructions in order to carry out the supposed intention of the legislature not ascertained from the language of the enactment, but inferred from ideas of expediency. Even if I were to look beyond the language of the enactment, I should think the justices ought to have a discretion as to the enforcement of the order. It is highly desirable that they should have it. But I do not think that I am at liberty to look beyond the words of the section, which are grammatical, and in their ordinary meaning are discretionary. It may be that, on the facts before them, the justices ought to enforce the order. But the question put to us is whether they have a discretion to do so or not. I think they have.

Willis Bund asked leave to appeal.

GROVE, J. We have no power to grant an appeal.

Solicitors for appellant: *Morgan & Gilks.*

J. E.

NESS AND ANOTHER, APPELLANTS; STEPHENSON, RESPONDENT. 1882 *April* 3.

Landlord and Tenant—Lodger's Goods Protection Act, 1871 (34 & 35 *Vict.* c. 79)—"*Lodger*."

If the landlord, reserving a room in a house, lets the rest of it to a person, but retains such control and dominion over it as is usually retained by masters of houses let in lodgings, the relation of landlord and "lodger" may exist between the parties within the meaning of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), although the lodger has the right of exclusively occupying the greater part of the premises, and has separate and uncontrolled power of ingress and egress, and neither the landlord nor his agent sleeps or resides in the house, and the lodger acts as caretaker of the part reserved.

The existence of the relationship of landlord and lodger is a question of fact.

CASE stated by justices of the borough of Sunderland.

The appellants were summoned to answer a complaint by the respondent alleging that they, on the 14th day of September, 1881, did levy a distress on the goods of one Elizabeth Mary Stephenson for rent due to the appellant, John Ness, from one Tomlinson, the immediate tenant of Ness in respect of certain premises situate at 26, Villiers Street, in the borough, in part of which premises Elizabeth Mary Stephenson was the lodger of Tomlinson, no rent being due from her to Tomlinson, and that she had duly served upon each of the appellants a declaration in writing made by her setting forth that Tomlinson had no right of property or beneficial interest in the goods so distrained, and that such goods were her property, and that no rent was due as aforesaid, and to which declaration a correct inventory was annexed, subscribed by her, of the goods referred to in the declaration: And she prayed that they might be summoned to shew cause why an order should not be made for the restoration of the said goods.

It was proved on the hearing that Tomlinson was tenant from year to year of the appellant Ness, at a rental of 45*l.* per annum, of a building in Villiers Street, Sunderland, which was originally a dwelling-house, but the ground floor of which was converted some years ago into a shop. The respondent, in August, 1879, took from Tomlinson the whole house, except the shop, on a yearly tenancy at a rent of 16*l.* payable quarterly.

1882

NESS v. STEPHENSON.

There was no front door to the building in question other than the shop door, but there was a door from the house into the yard behind it, and from the yard into a back street. There was inside the building a door leading from the shop into the respondent's premises.

The respondent took in lodgers; she provided all the furniture used in her premises.

Neither Tomlinson nor any servant or agent of his lived or slept on the premises. Tomlinson used the shop as an auction-room, and occasionally let it for balls or dancing parties in the evening. No auction had, however, been held there during the fifteen or eighteen months immediately preceding the distress; but balls or dancing parties had occasionally been held there during that period. There were some articles of trifling value belonging to Tomlinson in the shop, but he had not actually used the shop for any purpose (except as before named) during the fifteen or eighteen months preceding the distress.

The respondent had access to her premises by the back street at all times, and through the shop when it was open, and at her request Tomlinson, at some time after the commencement of the tenancy, also permitted her to have a key of the shop, and to use the shop door as a front entrance to her premises when the shop was closed. The respondent used to clean the shop and act as caretaker.

On the 14th of September last, there being an arrear of rent due from Tomlinson to the appellant Ness, the latter by the appellant Trail, his bailiff, distrained for it all the goods on the premises, including the respondent's furniture then being in parts of the building other than the shop. The goods were removed from the premises and impounded on the same day, and at the time of the hearing they were still so impounded in the possession of the appellants or one of them.

On the 17th of September the respondent served the appellants with a declaration and notice under the Lodger's Goods Protection Act (34 & 35 Vict. c. 79) that the goods were her property and no rent was due from her to Tomlinson.

There was no rent due from the respondent to Tomlinson when the distress was made.

It was contended, inter alia, that the respondent was not a lodger within the meaning of the Act.

The justices on the authority of *Phillips* v. *Henson* (1) held the respondent to be a lodger, and ordered the appellants to return to the respondent the goods belonging to her which they had distrained.

The question for the opinion of the Court was: Was the respondent a lodger within the meaning of the Act?

Other points raised by the case were not argued.

Gainsford Bruce, for the appellants. Lodgers only are protected by the Act. The respondent was not a "lodger" within the meaning of it. The justices followed *Phillips* v. *Henson*. (1) But in that case the mesne tenant resided on the premises. In *Morton* v. *Palmer* (2) the Court of Appeal held that there must be evidence of the retention by the immediate landlord, by himself or his servants, of some such dominion and power over the house sublet as the master of a house let in lodgings usually has, although it is not absolutely necessary that the immediate landlord should himself reside on the premises. The landlord may of course have members of his family or servants in his place residing on the premises. The respondent had exclusive possession of her rooms in the house. She could bring an action for trespass to it, whereas a lodger could not: see per Blackburn, J.; *Allan* v. *Liverpool*. (3) In *Bradley* v. *Baylis* (4) Jessel, M.R., said that he had been quite unable to frame an exhaustive definition of "lodger," and that it was "wiser and safer to say that the question whether a man is a lodger or whether he is an occupying tenant must depend on the circumstances of each case," and in *Kirby* v. *Biffen* (5), one of the three cases then together under consideration, his lordship said the claimant was an occupying tenant. "The landlord has no control over the house, and he does not interfere with it in any way whatever. He neither lives there himself nor do his servants, and he does not render any service to the tenants." There the passages and staircases were reserved.

(1) 3 C. P. D. 26.
(2) 51 L. J. (Q.B.D.) 7.
(3) Law Rep. 9 Q. B. 180, at p. 192.
(4) 8 Q. B. D. 195, at p. 219.
(5) 8 Q. B. D. 195, at p. 221.

1882

NESS v. STEPHENSON.

The result of the authorities is that in order to constitute a lodger the landlord must exercise some kind of control over the premises. Mere reservation of a part of the premises does not make the rest lodgings. Here he merely reserved a room only used occasionally for dancing. He had no control over the respondent or inmates. He did not reside on the premises nor did anybody representing him. The respondent had the keys, and the fact of her being employed as caretaker of the reserved portion is more consistent with a tenancy than with a contract of lodging. He could not be said to exercise control over the lodger through the lodger herself. She was employed to clean his part of the premises, and not to control for him her use of her own.

Joel, for the respondent. The true test of the question is to find if the landlord had control over the premises. He had; paragraph 5 of the case shews it. The respondent may be in one sense a sub-tenant, and yet also a lodger within the meaning of the Act: *Phillips* v. *Henson*. (1) That case is not overruled, and is in point. The fact that the landlady there slept on the premises makes no difference. It is clear from the judgment of Brett, L.J., in *Morton* v. *Palmer* (2) that the landlord need not sleep in the house to preserve his control. The retention of a room in the house gives him control, and he has, moreover, a right to the use of the front door, area, staircase, and chimneys. All the incidents of a "lodger" according to the authorities exist in this case. The definition given by Bovill, C.J., in *Thompson* v. *Ward* (3) is satisfied. In *Allan* v. *Liverpool* (4) Blackburn, J., says such a lodger cannot bring trespass quare clausum fregit, and is not rateable. Here the landlord pays all the rates and the lodger is not rateable. In *Stamper* v. *Overseers of Sunderland* (5) the distinction between the popular and legal meaning of the word "lodger" is pointed out by Montague Smith, J. If not a lodger in common parlance the respondent is a lodger within the meaning of the Act, and is entitled to the protection it gives.

Gainsford Bruce, in reply.

Cur. adv. vult.

(1) 3 C. P. D. 26.
(2) 51 L. J. (Q.B.D.) 7.
(3) Law Rep. 6 C. P. 327, 360.
(4) Law Rep. 9 Q. B. 180, at p. 192.
(5) Law Rep. 3 C. P. 388.

1882

NESS v. STEPHENSON.

April 3. FIELD, J. (after stating the question and the facts found in the case). It is reasonably clear that the mere right of exclusive occupation, although of a very considerable part of a dwelling-house, is not inconsistent with the existence of the relation of landlord and lodger (*Phillips* v. *Henson* (1)), nor does the fact that the landlord does not either by himself or agent sleep or reside in the house prevent the existence of that relation (*Morton* v. *Palmer* (2)), so also the nature or extent of the landlord's enjoyment of the portion of the house retained by him or the separate and uncontrolled power of ingress and egress granted to the respondent by the use of a door other than the front or shop door will not prevent the existence of the relation (per Maule, J., *Toms* v. *Luckett*. (3))

Neither is it material that the landlord does not render any service to his tenant.

All these are matters which may be taken into consideration for the purpose of answering the question to be decided, but they are all consistent with the retaining of such control and dominion over the house by the landlord as is usually retained by masters of houses let in lodgings, as distinguishable from landlords absolutely letting the tenements, and that retention of control and dominion indicates the existence of the relation of landlord and lodger between himself and his tenants.

Now it is clear that Tomlinson before the letting to the respondent had the whole control and dominion of the house, and he has of course left in him all that he has not parted with.

His mere right of access for the purpose of repair would not be enough to indicate such a retention, for that might be implied from the terms of the demise whether the case were one of tenant or lodger.

It is settled that the question whether a landlord has retained such dominion and control over the house so as to make the person to whom he lets part of it, retaining the rest in his own possession, a lodger with him, is a question of fact to be decided by a jury or justices who are judges of fact.

In this case the justices have found that the relation existed,

(1) 3 C. P. D. 26.

(2) 51 L. J. (Q.B.D.) 7.

(3) 5 C. B. 23.

1882

NESS v. STEPHENSON.

Field, J.

and unless I can see my way to hold that they have arrived at that result without any evidence to that effect, or that this result has been arrived at by them upon a misapprehension of law, I cannot interfere with their decision. But I think that there was evidence in this case upon which they might reasonably come to the conclusion at which they have arrived.

Indeed the facts are hardly if at all distinguishable from those in *Phillips* v. *Henson* (1), and those which existed in *Morton* v. *Palmer* (2) up to the time when Brooks, the landlord in that case, had, as was supposed, by some dealings with Jacques, determined the previous relation existing between him and the plaintiff. And there being thus, I think, evidence for the justices, I cannot see that they were under any error or misapprehension as to the law applicable to the case, and their decision therefore must be affirmed, and the appeal dismissed with costs.

HUDDLESTON, B. I am of the same opinion. The question in this case is whether the justices were right in holding that Mrs. Stephenson was a lodger within the meaning of the Lodgers' Goods Protection Act, 1871. The other points were abandoned by Mr. Gainsford Bruce. The case of *Morton* v. *Palmer* (2) was relied on for the appellants. The real facts of that case as proved before me on the trial do not seem to have been brought to the attention of the Court of Appeal. It is stated in the report that Brooks ceased to live in the house, and let the shop and basement to a man called Jacques, and the Court of Appeal seem to have come to the conclusion that Brooks had given up to Jacques exclusive possession of every part of the house and all the dominion over it. The statement in the report and the conclusion arrived at by the Court of Appeal are not warranted by my notes of the trial. The defendant Palmer called no witnesses, but rested his case on the cross-examination of the plaintiff Morton, who, admitting an occupation by Jacques, said he was entirely unaware of the terms existing between Jacques and Brooks, "he thought perhaps that they were connected in business." The only thing he knew with respect to Jacques coming in or Brooks going out was by seeing Jacques' name on

(1) 3 C. P. D. 26. (2) 51 L. J. (Q.B.D.) 7.

the door, but that Brooks was frequently there when Jacques was there, as he had been before, and that he, the plaintiff, continued to pay the rent to Brooks in the same way, sometimes to Brooks and sometimes to his clerk and agent. It was not shewn that Brooks ever resided on the premises. Even before Jacques made his appearance, Brooks had an office in Lupus Street, and sometimes lived in Charlwood Street in the neighbourhood. Jacques' name was on the door, but Brooks' name remained over the shop. These facts, if believed, shewed in my judgment that Morton was Brooks' lodger, and I told the jury so. In this view I was supported by my Brother Grove in banc when the defendants moved for a new trial. I thought that Morton had made out affirmatively, as he was bound to do, that he was Brooks' lodger prior to the appearance of Jacques' name in the matter. Brooks was in possession of the lower part of the premises, exercising supervision, or, as it is said, power in and dominion over the house, receiving the rents and occupying a portion of the premises either by himself or his servants, or at least living sufficiently near to exercise supervision over the house. Indeed the members of the Court of Appeal, certainly Brett, L.J., seem to have been of the same opinion as to Brooks' status as lodger before the appearance of Jacques. "If," says Brett, L.J., "as between Jacques and Brooks what was done did not amount to a resignation of power and dominion such as I have indicated, then I am of opinion that although Brooks was no longer living in the house, still the plaintiff would be his lodger." The status therefore of lodger being established by the plaintiff, I considered that it rested on the defendant to alter that state of things, which he failed to do by merely shewing some unexplained enjoyment by Jacques. I thought it was not shewn, to use the words of Brett, L.J., "that what was done amounted to a resignation of power and dominion by Brooks to Jacques, or giving up by Brooks of all the possession of and control over the house to Jacques." No change of position was proved, and I therefore considered that the relation of lodger continued to exist. I cannot help coming to the conclusion that, if the real facts in the case of *Morton* v. *Palmer* (1) had been clearly brought to the attention of the Court

(1) 51 L. J. (Q.B.D.) 7.

1882

NESS v. STEPHENSON.

Huddleston, B.

of Appeal, the plaintiff would have been allowed to maintain his verdict, and that a new trial would not have been granted. *Morton* v. *Palmer* (1), as properly understood, is really an authority for the respondent. In the present case the position of Tomlinson and the plaintiff are very similar to those of Morton and Brooks as proved on the trial before me. Mrs. Stephenson took the whole of the premises from Tomlinson except the lower part which had been part of the dwelling-house, but had been converted into a shop. It is true that neither Tomlinson nor any servant or agent of his lived or slept on the premises, but the Case finds that he used the premises as auction rooms, though no auction had been held there for fifteen or eighteen months, and also for balls and dancing parties occasionally. He had some sort of occupation, for he kept some few articles there, though of trifling value, but he employed Mrs. Stephenson to clean the shop and act as his caretaker. The premises were not distinct from Tomlinson's, for there was a door inside the building leading from the shop into that part of the premises let to Mrs. Stephenson. It does not appear whether there was a lock on that door. Mrs. Stephenson had access through a door in a back yard, and from thence to a back street, but the only front entrance was through Tomlinson's shop. When the shop door was open Mrs. Stephenson had access to her premises through the shop, and when it was closed Mrs. Tomlinson had a key given to her so as to enable her to have the shop as a front entrance.

It has been said by the Court of Appeal in *Morton* v. *Palmer* (1), and again in *Bradley* v. *Baylis* (2), that it is not easy to give an exhaustive definition of the word lodger; but according to Brett, L.J., "the word lodger must be taken to mean a lodger according to the understanding of that word by the majority of persons conversant with the modes of letting and occupying houses in this country to lodgers and undertenants." Lord Justice Cotton's definition is "that a lodger is a man living in a house owned by, or leased by another person, and to some extent living there with that other person." Lindley, L.J., says that the phrase "a lodger denotes a personal relation of some one lodging somewhere with somebody." If I were to decide this

(1) 51 L. J. (Q.B.D.) 7. (2) 8 Q. B. D. 195.

case on those definitions I should say that I think the majority of persons conversant with the mode of letting and occupying houses in this country to lodgers and undertenants could call Mrs. Stephenson a lodger. I think she was living in Tomlinson's house, and to some extent living there with him, and that there was a personal relation, such as is suggested by Lindley, L.J., of some one lodging somewhere with somebody.

The question, however, has undergone much further consideration in the case of *Bradley* v. *Baylis*. (1) There the Master of the Rolls observes that he could not frame an exhaustive definition of the word lodger, and that the judges who have tried to do so have, in his judgment, failed, and that the wiser and safer course is to say that each case must depend on its own circumstances. He puts two extreme cases, in the one of which the person clearly would be a lodger and in the other he would not. In the former case he says: "Where the owner of the house does not let the whole of it, but retains a part for his own residence, and resides there, and where he does not let out the passages, staircase, and outer door, but gives to the 'inmates' merely a right of ingress and egress, and retains to himself the general control with the right of interfering—I do not mean an actual interference, but a right to interfere, a right to turn out trespassers, and so on; there I consider that such owner is the occupying tenant of the house, and the inmate, whether he has or has not the exclusive use of the room, is a lodger." This definition would clearly render Mrs. Stephenson a lodger; the only difference would arise in the fact of residence, but it has been repeatedly held that residence of the intermediate tenant is not absolutely necessary if he himself, or through his servants or other person for him, exercises power and control over the house.

Tomlinson, though not residing, retained control over the entrance, giving Mrs. Stephenson permission to use the shop door, and employed her as his caretaker to clean and look after the premises. I think that the employment of the lodger in that respect would be the same as if he had put his own servant in for that purpose; he not the less preserved his dominion as master of the house.

(1) 8 Q. B. D. 195, at p. 219.

1882

NESS v. STEPHENSON.

Huddleston, B.

This is in accordance with the view of Brett, L.J., in *Bradley* v. *Baylis*. (1) If the owner of the house does not reside in it, "yet if he by his servants performs any duties in the house or undertakes a certain control, any person who occupies only a part of that house as his tenant may be properly said to be a lodger with him."

Cotton, L.J. (2), says: "It is not necessary that the person with whom he lodges, that is, his immediate landlord, should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but in my opinion some control over the house must be exercised by the person in whose house a man lives to make him a lodger."

These definitions seem to shew conclusively that on the facts proved before me in *Morton* v. *Palmer* (3) Palmer was Brooks' tenant, as they shew that Mrs. Stephenson was Tomlinson's. I think, therefore, that the justices came to a correct conclusion, and that this order must therefore be confirmed, and the appeal be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *J. & E. Scott.*

Solicitor for respondent: *Robson.*

J. R.

April 28.

IN RE CHAPMAN.

Practice—Costs—Counsel at Chambers — Solicitor and Client — Taxation — Special Allowances—Rule 14.

The Supreme Court Special Allowances, Rule 14, that "as to counsel attending at judges' chambers no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend," applies to taxation of costs between solicitor and client as well as between party and party.

Affirmed on appeal 10 Q.B.D. 74. C.A.

APPEAL from Chambers.

On the taxation of a bill of costs delivered by a solicitor to his client, the taxing master disallowed certain items of costs in respect of the attendance of counsel at judge's chambers, for which

(1) 8 Q. B. D. 195, at p. 235. (2) 8 Q. B. D. 195, at p. 241.
(3) 51 L. J. (Q.B.D.) 7. WA 87/141.

the judge had not certified, but which the client had expressly authorized. The master stated as a reason for the disallowance that "Rule 14 of Special Allowances applies to taxation as between solicitor and client, as well as between party and party, and herein differs from the old rule of Hilary Term, 1853, which only applied as between party and party. The fact of the client's authority having been obtained does not make any difference, as his attention was not called to the rule." A summons to review this taxation having been dismissed by Mathew, J., at chambers,

R. B. Muir moved to set aside the order of the learned judge, and for an order to review the taxation. The rules as to special allowances only apply to costs as between party and party. The test to ascertain if the cost of counsel attending judge's chambers should be allowed in cases between party and party is to inquire whether the case was fit for counsel, but as between solicitor and client, the test is to inquire whether the client authorized the attendance. The master infers that because the words "as between party and party," which were in the rule of Hilary Term, 1853, are absent from rule 14 (1), it applies to cases between solicitor and client. But it does not do so, at least in the Queen's Bench Division. Previously to the Judicature Acts there was one rule in common law and another rule in Chancery. Rule 14 is a verbatim copy of the Chancery rule: Cons. Ord. XL., rule 29. That fact rebuts the inference from the omission of the words "as between party and party," and shews that the intention was only to assimilate the practice of the two Divisions. But in Chancery some additional allowances of costs were in some cases occasionally made out of a fund. Hence the language of the order and rule. Although in force since 1852, yet it seems from inquiry at the Chancery offices that the provision has never yet been applied in Chancery as between solicitor and client. It would be a great hardship where, under express orders from his client, a solicitor has employed counsel to attend judge's chambers, that the solicitor should be disallowed his costs.

(1) Special allowances, rule 14: "As to counsel attending at judges' chambers, no costs thereof shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend."

1882

IN RE CHAPMAN.

Henry Kisch shewed cause. The Judicature Act, 1875, s. 17, authorizes the making of additional rules for regulating any matters relating to the costs of proceedings in the High Court of Justice. Under s. 17 rule 14 was made, and it applies to both Divisions of the High Court. The words are imperative and plain; no costs of counsel at chambers are in any case to be allowed unless certified for. The words "as between party and party" must not be inserted to limit the rules. The judge will certify in proper cases, and in others it is right that the client should not be bound to pay the costs improperly incurred.

GROVE, J. This case presents more difficulty than I at first thought. It was admitted that the rule is differently framed from the rule of Hilary Term, 1853, that "the costs of attendance by counsel or special pleader before a judge at chambers shall in no case be allowed as between party and party, unless the judge shall certify for such allowance." So when I found that the words "as between party and party" in the old rule are omitted from this, I thought it clear. But my opinion was somewhat shaken by the argument of Mr. Muir, who says that all the rules in the schedule of taxation only apply between party and party; and he also advanced reasons why it might be hard where a solicitor had full and ample authority from the client to employ counsel at chambers, and the master thought it a proper thing to be done, that the master should have no power to allow for counsel, and to enable the solicitor to get payment from the client. But in addition to the almost conclusive fact that the words "as between party and party" are omitted from the new rule, it is impossible to suppose that those who drew rule 14 did not fully consider rule 6 of Hilary Term, 1853. If so, then the words "between party and party" were intentionally omitted, and it was meant that the present rules should have wider application than the former one, and there are cogent reasons for it. First, much cost might be incurred by the unnecessary attendance of counsel at judge's chambers in matters of trifling importance, so the legislature thought it desirable that when counsel attend there should be a certificate by the learned judge; the same reasons apply as between party and party, and as between solicitor and client, for

the object of the legislature is to protect the client, who is in the hands of his solicitor, and to prevent solicitors needlessly employing counsel and charging their clients costs with which they ought not to be charged. The legislature may intend, and, as I think, by the words of the rule do intend, that the solicitor should not have the power of charging his client the cost of the attendance of counsel at chambers unless the learned judge there thinks fit to certify. That is a fair and reasonable rule, and so far from being manifestly unjust and absurd, it will in all probability work well and lead to more proper and expeditious conduct on the part of the solicitor.

Secondly, I find these rules are not exclusively confined to questions between "party and party." Lopes, J., has pointed out that rule 26, which is between party and party, differs from the rules which have no such limitation. By rule 26, "as to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party," &c. The rule does not contain the exact words "between party and party," but it evidently contemplates that. But there is another rule 21, that where "any party" appears upon any application in which he is not interested, or upon which he ought not to attend, he is not to be allowed any costs of such appearance unless the judge shall expressly direct. That rule seems to me to shew, first, that the rule contemplates something else than taxation as between party and party, for it relates to a party not interested in an application to chambers or on which he ought not to attend, and yet that person must get the certificate of the learned judge; and, secondly, that the party may and is expected to apply for a certificate of the learned judge although the matter is not between party and party. The reason, words, and fair construction of the rule are directly in favour of the decision of the learned judge, and it ought to be affirmed, and the appeal dismissed with costs.

LOPES, J. The terms of the rule are wide enough to include costs as between solicitor and client. But then it is said that the whole body of the rules only relates to costs between party and

1882

IN RE CHAPMAN.

party, and that in construing the words "in any case," we must confine them to costs "in any case between party and party." Is that so? I think there are strong grounds for construing them otherwise. Rule 26, on the one hand, and rule 21, on the other, seem to shew that at least some of the rules were intended to apply not only as between party and party, but as between solicitor and client, and that the words "in any case" in rule 14 apply to both classes of cases. Another and strong reason for so thinking is that the old rule 6 of the directions of Hilary Term, 1853, containing the words "as between party and party," must have been in view of the draughtsman of the new rule 14, and he left those words out of it and put into it the words "in any case," thereby shewing that rule 14 was intended to apply both to taxation between party and party and between solicitor and client.

It is argued that our construction of the rule will cause great hardship, but I fail to perceive it, for ex concessis the master has no discretion as to costs of attendance of counsel at chambers as between party and party, and if the rule is imperative in the one case why should it not be so in the other? I think those who made the rule considered that the attendance of counsel at chambers ought to be exceptional, and the costs ought only to be allowed when the learned judge who heard the facts should certify that it was a fit case for counsel. I am of opinion that the rule was intended to apply to both kinds of costs, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *Chapman.*
Solicitors for respondent: *Kisch, Son, & Hanbury.*

J. R.

THE SCHOOL ATTENDANCE COMMITTEE OF BELPER UNION, APPELLANT; BAILEY, RESPONDENT.

1882
April 28.

Elementary Education—Education Acts, 1870, 1876, *and* 1880; 33 *&* 34 *Vict. c.* 75; 39 *&* 40 *Vict. c.* 79; 43 *&* 44 *Vict. c.* 23—*By-laws—Non-attendance of Child at School—Liability of Parent—"Reasonable Excuse."*

A by-law made under the Elementary Education Acts provided that, "The parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance. Reasonable excuses.—Any of the following reasons shall be a reasonable excuse, namely: (*a.*) That the child is under efficient instruction in some other manner; (*b.*) That the child has been prevented from attending school by sickness or an unavoidable cause; (*c.*) That there is no public elementary school open which the child can attend within two miles. . . ."

From the 18th of May to the 23rd of September, the respondent, an engine-driver, caused his child to be sent daily from home in time to arrive at school when it opened. He did not receive any notice that the child had not duly attended, except on two occasions. On both occasions the respondent's wife corrected the child. Nevertheless it often failed to attend school. At the hearing of an information, which charged that the respondent on and ever since the 18th of May had neglected the by-law in not causing his child to attend school, the justices found that he had done all that could reasonably be expected of him to secure the attendance of the child at school, and had reasonable grounds for believing, and did believe, the child was duly attending school, and had, therefore, a "reasonable excuse" for not causing the child to attend school:—

Held, that there may be other "reasonable excuses" within the meaning of the by-law besides the three reasons therein specified, and that the justices were right.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions in Derbyshire an information by the appellants against the respondent under by-laws made by the appellants under the powers vested in them by the Education Acts, 1870, 1876, and 1880, charging that the respondent on and ever since the 18th of May, 1881, being the parent of a child named Richard over five and under thirteen years of age, had neglected and violated, without reasonable excuse, the by-laws in this, that he had not caused the child to attend a public elementary school during the whole time in which the school selected for the child to attend was open for the instruction of children of similar age, was heard and determined by the justices, who dismissed the information.

1882

BELPER SCHOOL ATTENDANCE COMMITTEE v. BAILEY.

The by-laws made by the appellants and duly sanctioned by order of her Majesty in Council formed part of the case and provided:

"(2.) The parent of every child of not less than five nor more than thirteen years of age shall cause such child to attend school, unless there be a reasonable excuse for non-attendance.

"*Reasonable Excuses.*

"Any of the following reasons shall be a reasonable excuse, namely:

"(*a.*) That the child is under efficient instruction in some other manner.

"(*b.*) That the child has been prevented from attending school by sickness or an unavoidable cause.

"(*c.*) That there is no public elementary school open which the child can attend within two miles, measured according to the nearest road from the residence of such child.

"*Time of attendance.*

"3. The time during which every child shall attend school shall be the whole time for which the school selected shall be open for the instruction of children of similar age. . . ."

6. [Prescribed a penalty on every parent for non-observance, neglect, or violation of the by-laws.]

Upon the hearing of the information the following evidence was given: that the appellants were the School Attendance Committee of the Belper Union, and the respondent was an engine-driver in their district, and was the parent of the child named in the information, who was eleven years of age.

A certificate of the teacher of the Public Elementary School at Derby that from the 18th of May, 1881, to the 23rd of September, 1881, the child had only made sixty-six attendances out of a possible 158 was produced. (1)

For the defence it was proved that, during the period in question, the child had invariably been sent from home at such an hour as would enable it to arrive at school at the proper time, and on

(1) A question as to whether the certificate was evidence of more than the mere absence of the child at the time of marking the register was raised in the case, but is immaterial here.

two occasions only had the respondent been informed, previous to the commencement of the proceedings, that the child had arrived too late to be marked on the register as attending, and that on both occasions the respondent's wife had corrected the child for loitering on his way to school, and it was further admitted by the appellants that the school fees had been paid.

The justices were of opinion, inter alia, that the defence of "reasonable excuse for non-attendance" could not be limited to the three cases specially mentioned in the by-law, and that the law only required reasonable efforts on the part of the parent to procure the attendance of his child, and that if he believed on reasonable grounds that his child was at school, he would be free from blame, inasmuch as a labouring man could not be expected to employ a servant to conduct his child to school.

Upon the evidence the justices found as facts, inter alia, that the respondent, having caused his child to be sent away from home in time for it to arrive at the opening of the school, and not having received any notice that it had not done so (except on two occasions on which the child was corrected), had done all that could be reasonably expected of him to secure the attendance of the child at school, and had reasonable grounds for believing, and did believe, the child was duly attending school, and had therefore a "reasonable excuse" for not "causing the child to attend school." The question for the opinion of the Court was whether the justices ought to have found that the ignorance of the respondent of the non-attendance of the child was not a "reasonable excuse" for his not causing the child to attend as alleged.

Mellor, Q.C., for the appellants. The by-laws specify three grounds of reasonable excuse for the non-attendance of a child at school. The respondent had none of them, and he could not set up any other. The object of the Acts and by-laws is to enforce the education of the child for its own good. It is not old enough to do what is best for itself, and the parent who has the legal custody and control of the child must ensure its attendance at school by delivering the child to the schoolmaster. If the parent cannot take the child he must send some one else to take it.

1882

BELPER SCHOOL ATTENDANCE COMMITTEE v. BAILEY.

In *Saunders* v. *Richardson* (1) the Court seemed to treat the excuses specified in s. 11 as the only excuses for non-compliance with that section.

No counsel appeared for the respondent.

GROVE, J. I think the justices were right, or, at least, I certainly cannot say that they were wrong. The circumstances were that this child of eleven years was sent by the parent every day to go to school at the usual time, and the parent had only on two occasions reason to believe that the child did not attend. On those two occasions, and on notice of the non-attendance, the mother corrected the child, and the respondent might assume that thenceforth it was obediently attending school. He never heard, nor had any notice sent to him, that the child was not thenceforth attending, and he was probably led by the child to believe that it was attending, and had no reason to disbelieve it. Therefore, I think he had reasonable excuse. The by-law prescribes that the parent "shall cause such child to attend school." Primâ facie it might be said that if those words stood alone the parent would be bound not only to send the child but to take it to the school door; but the by-law proceeds, "unless there be a reasonable excuse for non-attendance." Then three reasons are stated which are reasonable excuses. But they are not all, for if they were, a number of perfectly reasonable causes of excuse would be excluded, and they are not excluded. The by-law does not say, the following are the only reasonable excuses which shall be entertained, but the reasons specified are given partly as illustration, and partly as three reasonable excuses which may very often arise. Practically, therefore, it comes to this—the father shall cause his child to attend school unless there is reasonable excuse for non-attendance. Who are to judge of the reasonable excuses? The justices. They have held that the excuse of the respondent was reasonable, and I think it was reasonable. If we were to hold the contrary, a parent of every child between the ages of five and thirteen would be obliged to go daily to school with that child, because even if an elder child, or a friend, or a servant were employed to take the child to school, the parent

(1) 7 Q. B. D. 388.

would still be responsible for any negligence whereby the child wandered. It would be wholly impracticable to require the parent to go to school with the child. We must not, however, be understood to say by our decision that in all cases of this kind the father is not liable. His liability must depend on circumstances. If he were, in a mere perfunctory manner, to put the child outside the door to go to school, and he were then to set up an assumption that the child attended school, the parent might be liable for the non-attendance of the child.

LOPES, J. I think the justices were right. It is said that the parent ought to have caused the child to attend school by sending an elder child, or servant, or some one, or by going himself with the child to the school. But the father is away from home all day at work for the support of his family, and the mother probably must stay at home taking care of her young children, and cannot go. There is no evidence that any one else could go. Mr. Mellor contended that the respondent's excuse is not a reasonable excuse, because it is not one of the three reasons mentioned in the by-law, and that those are all the grounds which could be entertained by the justices as reasonable excuses. Surely there must be many other grounds of non-attendance, which beyond doubt will be reasonable excuses. I think the by-law means that the child shall attend school unless there is reasonable excuse, and then three illustrations of reasonable excuses are given. But the justices may act on other reasonable excuses.

Decision affirmed. Leave to appeal refused.

Solicitors for appellants: *Warriner & Cross, for W. B. Hextall, Derby.*

J. R.

1882
April 3.

[IN THE COURT OF APPEAL.]

HARRIS *v.* TRUMAN AND OTHERS.

Principal and Agent—Property, passing of, in Goods bought by Agent—Trustee—Trust Funds misapplied, following Proceeds of—Moneys held in a Fiduciary Character—Advances for particular Purpose misappropriated—False Representation—Estoppel—Trustee in Bankruptcy takes Property subject to same Rights and Equities as Bankrupt—Reputed Ownership.

The defendants were brewers and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows:—

F. occupied the malting premises, and took out the necessary licenses. It was his duty to buy barley in his own name as principal for cash, to send in to the defendants certain periodical accounts of the barley so bought from time to time, and the prices of the same, to submit samples to the defendants, and if the barley was approved of by them to malt it and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewers, and not the malting agents, provide the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shewn by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt upon credit. He likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about £22,000, and malt to the value of about £35,000, upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. He absconded and thereby committed an act of bankruptcy. Between the time of F.'s absconding and the time when he was adjudged a bankrupt, the defendants seized the barley and the

malt left on his premises. The plaintiff, trustee in F.'s bankruptcy, sued the defendants for the value of the same :—

Held, affirming the judgment of the Queen's Bench Division, that the plaintiff could not recover, on the ground that the relation between the defendants and F. was that of principals and agent, and that the property in the barley and the malt had vested in the defendants, and that the barley and the malt were not in the order and disposition of F. as the reputed owner thereof, it being notorious that "malting agents" are in many instances not the owners of the barley and malt on their malting premises ; and also on the further ground that the moneys advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and the malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants but in F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of the trust moneys, or in substitution for the barley in payment for which F. ought to have applied such trust-moneys; that F. could not have set up his own breach of trust or have been heard to allege that the barley was bought otherwise than according to the authority given to him by the defendants; and that the plaintiff, as F.'s trustee in bankruptcy, could not in this respect stand in a better position than F. himself.

APPEAL by the plaintiff from an order of the Queen's Bench Division (Field, Manisty, and Bowen, JJ.) directing the entry of the judgment for the defendants. (1) The action was brought by the plaintiff, as trustee in bankruptcy of one Fairman, to recover the value of certain barley and malt alleged to have been converted by the defendants to their own use.

The facts are stated in the above head-note, and are fully set forth in the judgments delivered in the Queen's Bench Division. (1)

March 28, 30. *Sir H. Giffard, Q.C.*, and *W. G. Harrison, Q.C.* (*Moulton*, with them), for the plaintiff. First, the property in the barley bought by Fairman did not pass to the defendants. He might have dealt with the money which they advanced to him; he might have changed the barley of which he had delivered samples to the defendants, and might have delivered samples of other barley to them. It is unnecessary for the plaintiff to contend that Fairman was entitled to turn into malt the barley which he had bought with the defendants' money, and afterwards to sell the malt in the market; but it is to be recollected that he was

(1) 7 Q. B. D. 340.

1882

HARRIS v. TRUMAN.

either the owner or the hirer of the necessary malting premises, and his primâ facie title to the ownership of the barley and malt, arising from his possession, is not displaced by the facts proved at the trial. The fact that Fairman insured the barley and the malt shews that the property therein remained in him.

Secondly, no trust existed in favour of the defendants; the malt and the barley alleged to belong to them could not be identified; and a trust can exist only in those chattels which are capable of being identified.

Thirdly, there was no estoppel: the facts do not shew that the defendants' position was altered by their acting upon the false representations of Fairman.

Sir F. Herschell, S.G., and *Kenelm Digby* (*Benjamin, Q.C.*, with them), were not heard.

Cur. adv. vult.

April 3. The following judgments were delivered:—

LORD COLERIDGE, C.J. I gather from the judgment of Manisty, J. (1), that the plaintiff as trustee represents only the dealers, the defendants having paid all the farmers under protest. The plaintiff claims to be entitled to maintain an action for the value of the malt and barley seized by the defendants upon the malting premises occupied by Fairman at the time of his bankruptcy; and the right to sue depends mainly upon the question, whether the property in the malt and barley was in the defendants or Fairman. Two subordinate questions also arise, namely, whether Fairman had so conducted himself that a trust in favour of the defendants attached over the malt and the barley in his possession, and whether by construction of law Fairman was estopped from denying that the property in them had passed to the defendants.

It may be said that the first question is concluded by the findings of the jury. At the trial the jury found (2) that it was not the intention of the parties, as evidenced by the agreed course of dealing between them, that the property in the barley bought by the bankrupt should become vested in the defendants at any

(1) 7 Q. B. D. 355. (2) 7 Q. B. D. 350.

1882

HARRIS v. TRUMAN.

Lord Coleridge, C.J.

time before delivery to the defendants; they found also that it was the intention that the malt should become the property of the defendants on payment of the duty. It was agreed that the Queen's Bench Division should have power to draw inferences of fact, not inconsistent with the findings of the jury. (1) If we were absolutely bound by the findings of fact, it would be necessary to consider whether we ought not to order a new trial; nevertheless I may say that so far as they go, I concur to a great extent with the views of the judges in the Queen's Bench Division. We are, however, by Rules of the Supreme Court, 1875, Order XL., rule 10, invested with the power of finally determining the questions in dispute, and of giving judgment accordingly; and I am of opinion that the findings of the jury cannot be sustained. I think that Fairman was the defendants' agent and that, so soon as the property in the malt and barley became vested in Fairman, it became vested in the defendants. This really puts an end to the matter in dispute; for if the agent could not as against his principals claim the malt and the barley as his own, his trustee in bankruptcy stands in the same position, and can have no greater rights. The facts which it is necessary to consider are admirably stated by Field, J., in the course of his judgment (2); it follows from those facts that Fairman was bound to act for the defendants' benefit. All the barley upon Fairman's premises had been bought with the defendants' money and it was to be turned into malt for the defendants' use; no malt or barley was to be at the defendants' malting premises, except malt and barley bought upon the defendants' account. It seems to me that the relation of principals and agent existed between the defendants and Fairman, and that as between them and him it could not have lain in his mouth to say that the barley and the malt did not belong to them. The only incident which seems to point to a contrary conclusion was the circumstance that Fairman insured the barley and the malt against loss by fire, and that at one time he had effected the insurance with and paid the premiums to any office that he pleased. It was urged that the circumstances attending the insurance amounted to a kind of admission by the defendants that the barley did not belong to them; I do not deny

(1) 7 Q. B. D. 351, 356. (2) 7 Q. B. D. 344–348.

1882

HARRIS v. TRUMAN.

Lord Coleridge, C.J.

that some weight ought to be attached to this argument; but a strong argument against the plaintiff also arises from this incident; for if the barley and the malt were Fairman's, it would be strange that he should be compelled by the course of business to insure his own property; and it is to be remarked that when the defendants became their own insurers and stood to their own losses by fire, they took the amount of the premiums out of the commission payable to him, and they took off a percentage necessary to reimburse them for the risk of loss which they undertook. I am, therefore, of opinion that the relation of principal and agent existed, and that judgment must be entered for the defendants. I by no means say that the judges of the Queen's Bench Division were wrong in feeling themselves bound by the finding of the jury; I merely wish to remark that if the jury were wrong the ordinary relation of principal and agent existed, and the defendants are entitled to succeed; but if they were right I agree with the conclusions at which the judges of the Queen's Bench Division arrived.

The judgment of the Court below is founded mainly on two grounds. The first ground is of this nature: when large amounts of money are intrusted to a man to buy goods and to carry on a business he becomes a trustee for the person to whom the money belongs, and the proceeds of the money are affected with a trust. This is an old and well established doctrine in equity: it applies where the relation of principal and agent in the ordinary sense of the words does not exist. According to this doctrine, where a confidence is created between two persons, and where the one receives the money on the faith that he will do a certain thing, and leads the other who has given the money to understand that the thing has been done, as between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the benefit of the person giving the money. I think that this ground is quite right.

I think that the second ground of the judgment of the Queen's Bench Division is right also. A person placed in a fiduciary relation with another may have dealings of his own, and may mix up his own dealings with the dealings on behalf of his cestui

que trust; but it has been held in Courts of Equity that when a fiduciary relation has been created in respect of a fund which has been misapplied, and when it cannot be shewn what portion of the proceeds of the fund is really subject to the trust, the trust shall be considered to be attached to the whole of the proceeds, and it shall not lie in the mouth of the trustee to say that any portion of those proceeds is not affected with the trust. The same rule is applied where by a long course of dealing and by constant representation a person intrusted with money is fulfilling for the benefit of his employer the duties which have been cast upon him by his employment. In a case of this description the person employed is estopped from setting up the real state of matters, because his employer has dealt with him on the faith of his representation that another state of things existed.

These are the grounds upon which the judges of the Queen's Bench Division have held that the defendants are entitled to succeed. As Fairman could not have denied the fiduciary obligation and would have been estopped from setting up the facts as they actually existed, his trustee in bankruptcy can be in no better position than himself.

I think, therefore, that in every point of view the judgment of the Queen's Bench Division was right, and ought to be affirmed.

BRETT, L.J. In this case Fairman, being a debtor, absconded in order to avoid his liabilities to his creditors, and he thereby committed an act of bankruptcy. After that act of bankruptcy had been committed, the defendants seized a large quantity of barley and malt which were in certain buildings belonging to Fairman. The plaintiff is the trustee in bankruptcy of Fairman, and has brought this action, alleging that all or the greater part of the goods so seized were, both at law and in equity, the property of the bankrupt, and that the defendants had no interest in them; and, by way of an alternative claim, he alleges that the goods which were seized, or the greater part of them, were at the time of the bankruptcy in the order and disposition of the bankrupt, even though they were the property of the defendants; and, therefore, that he, as the trustee in bankruptcy, is entitled to recover against the defendants. It is suggested that the defend-

1882

HARRIS v. TRUMAN.

Brett, L.J.

ants were entitled to seize the malt and the barley on the ground that the property therein was in them and not in the bankrupt; and, further, that if the property in the barley and malt seized was not in the defendants, yet either the bankrupt was a bare trustee thereof for the defendants, or it was in equity charged with the whole sum paid for it by the defendants. It was alleged on the part of the defendants that if these goods, either at law or in equity, belonged to the defendants, they were not in the order and disposition of the bankrupt at the time of the bankruptcy, because by the very nature of the business he was not the reputed owner of them.

The more I have thought of this case, the more I have become convinced that it is impossible in any view that the plaintiff, as trustee in bankruptcy, can successfully claim any part of this barley or malt as against the defendants. It seems to me that the whole of the difficulty has arisen, because the defendants wished not to deal directly with the excise. If it had been openly stated in express terms that the barley was the defendants' and that Fairman was employed only as a servant to turn it into malt, it might have been said that the defendants ought to have taken out the licenses and ought to have been directly under the authority of the excise. The defendants, however, employed Fairman as their malting agent, who took out the licenses and in the first instance paid the duty.

I think that the facts are not really in dispute, and I agree with the Lord Chief Justice that, if it is necessary to set aside the findings of the jury in this case, we have all the facts with regard to the defendants' business before us, so as to enable us to exercise the power given to us by the Rules of the Supreme Court, 1875, Order XL., rule 10, and to declare what judgment ought to be entered. The facts may be shortly stated as follows: A contract was entered into between the defendants as brewers and Fairman as "malting agent," under which he was to have possession of buildings called "malting premises." He was to go into the markets and, in his own name and without authority from the defendants to pledge their credit, but upon his own credit, to make contracts for barley. To enable him to make those contracts, a fund was opened in the name of the defendants at the

bankers'. Fairman was to pay for each parcel of barley by drawing out a proper amount from the account which stood at the bankers' in the name of the defendants. He was therefore a person who was put in funds; and although he was the agent of the defendants to buy barley for them, he was not such an agent as by the mere nature of his employment had authority to bind his principals by pledging their credit; it would require an express authority from his principals, or at least an authority to be implied from the course of business between them and him, to enable him to pledge their credit; but it is clear that Fairman had no authority to pledge the credit of the defendants, because there was a stipulation that he was to pay in cash for all barley that was to be malted for them. Therefore, it seems to me that under no circumstances could the defendants have been made liable to the sellers of the barley. After Fairman had bought the barley, he was to send samples to the defendants in order to ascertain whether it was barley of which they approved; upon their approval of the samples he stated to them the quantities which he said that he had bought. That barley was to be taken to his malting premises, and it seems to me to be clear that no barley could properly be taken to those malting premises except barley which had been approved of by the defendants. The defendants kept the account in such a state that Fairman could draw upon it. The barley having been thus bought, thus approved, and thus taken to the malting premises, if Fairman had acted honestly and according to the arrangement between him and the defendants, all that barley ought to have been malted for the defendants. All the malt was to go to the defendants, and, as I understand, even all the refuse belonged to them, so that if Fairman sold it he was to account to them for the price. But Fairman, dishonestly as against the defendants, did buy barley, and although he drew upon the account at the bankers' he did not pay for the barley; and in other instances he has sold either the barley or the malt made from it, and has kept the price. It follows from this state of facts that all the interest in the barley went to the defendants. It seems absurd to suggest that according to the contract between Fairman and the defendants, Fairman could have bought the barley at one price and charged

1882

HARRIS v. TRUMAN.

Brett, L.J.

it at a higher price to the defendants: he was bound to give all the benefit to the defendants. He was remunerated for his services by a commission. The result is that Fairman could not do one thing with the barley, which an owner in his own right could do with it. Moreover the duty on the barley, although in one sense it was paid by Fairman, was really paid by the defendants, because the defendants were sureties to the excise for the payment of the duty by Fairman, and always paid the duty with money of their own. The defendants paid for everything connected with the barley.

I will now speak of the insurance. It is true that for a time Fairman insured the barley, but it is equally true that the cost of the insurance was considered in fixing the amount of the commission; therefore the defendants really paid for the insurance. After a time on considering the magnitude of their transactions with regard to barley, the defendants insisted that Fairman should no longer insure the barley with insurance offices, they insisted that he should insure with them. That is merely a phrase. The truth is that the barley was no longer insured. It is absurd to say that if that barley had been destroyed by fire, the defendants would have had to pay the value of it to Fairman, for in that case they would pay him the price over again after having paid the price to him when he bought it. The real meaning of what they did was to insist that Fairman should no longer insure the barley, but that they should be their own insurers. Whilst they directed him to insure the barley, they paid the costs of insurance as part of the commission; but when they insisted that he should no longer insure, they deducted from the commission which they gave to him a sum, which upon calculation they found it would have cost them to insure the barley.

The jury have found that it was not the intention of the parties that the property in the barley should become vested in the defendants. I quite agree that under ordinary circumstances the intention of the parties to a contract is the chief matter to be considered; but I very much doubt whether the mere intention of the parties in this case was sufficient to determine in whom the legal property was vested. If two persons agree that facts shall be deemed to exist with regard to goods, which if they existed

would really give the whole interest in, and power over, the goods to the one, and would give no interest in, or power over, the goods to the other, and if everything is paid for by the one which would be paid for by an owner, and if nothing is paid for by the other which an owner would pay for, although for certain collateral purposes it may be the intention and the wish of the parties that the property should not pass, nevertheless, in my opinion, the property does pass; therefore, although the jury have found that in fact these parties intended or wished that the property should not pass, nevertheless I very much incline to think that it did pass. Therefore I think that it is unnecessary to set aside the finding of the jury. Nevertheless, if it is to be said that the property in the barley did pass to the defendants, certainly that can only mean that it was their property in point of law.

I must now consider what are the equities attaching to the case.

It may be said that if the business had been carried on honestly Fairman would be the bare trustee of the barley for the defendants from the time of its approval, and therefore that the defendants were owners in equity of that barley. But it may be urged on the other hand that a person cannot be a trustee, unless there is a contract that the relation of cestui que trust and trustee shall exist. I do not think that that is a true proposition. I think that the equity arises from the existence of certain facts and certain relations between the parties, and I think that where the facts are such as I have already stated, namely, that everything with regard to this barley was to be paid for by the defendants, and nothing was to be paid for by Fairman, an equity attaches upon those facts, and Fairman was a bare trustee for the defendants. But even if this is not so, I have not the smallest doubt that in equity it would be held that the barley was charged with the money actually paid by the defendants as the price of it. It may be urged that this barley was not paid for by the defendants, and that all that was done by the defendants was to advance money to Fairman to enable him to carry on his business. The more that proposition is examined the more absurd will it seem to be, for it supposes this state of circumstances, that the defendants were advancing to Fairman for the

1882

HARRIS v. TRUMAN.

Brett, L.J.

sake of his business enormous sums of money without any security. It therefore seems to me that the barley stood charged with the amount paid for it by the defendants from the moment when Fairman drew out that amount, and that even although the legal property may have been in Fairman, he was a bare trustee, or, at all events, he held the barley subject to an equitable charge for the full amount paid by the defendants. It was, urged, however, on the part of the plaintiff, that the barley dishonestly bought by Fairman was in one sense not bought for the defendants, that is to say, it was not bought by Fairman according to the course of his duty. Nothing can be more dishonest than Fairman's conduct; and in order to support this contention, it must be assumed either that Fairman bought the barley with the defendants' money intending to sell it again for his own benefit, or he bought it not intending to pay for it, and at the same time he drew upon the defendants' account. It seems to me that if Fairman had been the plaintiff in this action, it would have been impossible to allow him to set up his own fraud, after he had stated by his accounts that all the barley upon his malting premises had been bought by him for the defendants, and had been approved of by them, and was to be malted for their benefit and to be paid for by them; he would have been estopped from setting up his own fraud; and, as he would have been estopped, his trustee in bankruptcy, who is suing upon the relation between him and the defendants, is just as much estopped as he was. Therefore in every point of view the trustee in bankruptcy is disabled from recovering against the defendants.

It has been argued, at least in the Queen's Bench Division, that at the time of the bankruptcy the goods were in the order and disposition of the bankrupt. The jury have arrived at no conclusion upon that point; but, it was agreed that the judges of the divisional Court should have the power of drawing inferences of fact, and they have come to the conclusion that from the notoriety of the mode in which the business of a malting agent is carried on, no creditor dealing with him could have failed to be aware that in many instances he is not the legal or the equitable owner of the barley or the malt, and that the barley and the malt are in truth paid for by the brewers; in this state of circum-

stances the doctrine of reputed ownership does not apply, and the barley and the malt were not in the order and disposition of the bankrupt at the time of the bankruptcy.

I think that the judgment of the Queen's Bench Division ought to be affirmed.

HOLKER, L.J. In this case some amount of difficulty and complication has arisen.

The action has been brought to try whether the property in a large quantity of barley and also of malt was in the trustee of Fairman or in the defendants; there was also a second contention that these goods were in the order and disposition of the bankrupt by the consent of the true owners. As to the latter question it was agreed that practically it should be left to the judges of the Queen's Bench Division; they took a view against the plaintiff, and that really disposes of the question. I do not see how the plaintiff could have thought, at all events after the finding of the jury, that they would have taken a view in his favour as to this point, because the jury considered that the property was in the bankrupt, or rather in his trustee who represented him, and they would hardly be likely to come to the conclusion that the property in the barley and the malt was in the defendants. I think it unnecessary to say anything more upon that topic.

Then comes the question as to the findings of the jury. It may be difficult to dispute their correctness on such a subject as this; but I cannot help thinking that the findings were wrong; they have found in effect that the property in the barley did not pass to the defendants, and that the property in the malt passed only when the duty had been paid. It is difficult to conceive why the property should have passed to the defendants at that time and not at any previous time. But there are these salient facts. Fairman was the servant of the defendants; and it was his duty to carry on the business upon their behalf, and he was paid for his services by a commission. It is admitted that he could not sell the barley and the malt to other persons, and that he could not charge any profit to his employers, and yet it has been found that the property was in Fairman. It seems to me that it would have been a more sensible conclusion for the

1882

HARRIS v. TRUMAN.

Holker, L.J.

jury to arrive at if they had found that all that was done by Fairman was done by him as the agent of the defendants, and that the barley and the malt belonged to them. The Queen's Bench Division have considered, as I think rightly, that the finding might be interpreted by the light of the surrounding circumstances, and that Fairman either held the barley and the malt as trustee for the defendants, or held them charged with the price paid by the defendants.

It has been said that a large quantity of barley may have been bought by Fairman with his own money; the answer to that is, that Fairman and the plaintiff, as his trustee in bankruptcy, are estopped from alleging that. The doctrine of estoppel ought not be extended; but I think that the present case is clearly one of estoppel, for Fairman represented to the defendants that he had bought barley for them, and he got money from them in order to pay for it, and he and his trustee in bankruptcy cannot be allowed to say now that the barley and the malt do not belong to the defendants.

I think that the judgment of the Queen's Bench Division ought to stand.

Judgment affirmed.

Solicitor for plaintiff: *W. P. Slater.*

Solicitors for defendants: *Clapham & Fitch.*

J. E. H.

June 9.

[IN THE COURT OF APPEAL.]

CLACK *v.* WOOD.

Practice—Power of Court of Appeal to amend Record of Trial—Rules of Court, Orders LVIII. r. 5; *LIX. r.* 2—*Condition rendered impossible by Defendant—"Title to be approved by my Solicitor."*

At the trial of an action the jury found certain issues in favour of the plaintiff, and the judge reserved judgment. The verdict was entered as a general verdict for the plaintiff, but the judge notwithstanding the verdict gave judgment for the defendant.

On an appeal by the plaintiff from the judgment, the Court of Appeal amended the record by entering the verdict for the plaintiff on the issues only, and affirmed the judgment.

The plaintiff's claim was for commission on the sale of a piece of land by A.

to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's solicitor:—

Held, that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him as it was unreasonable for him to disapprove.

THE action in this case was brought by W. H. Clack a commission agent for the recovery of 100*l.* for commission earned by him as agent for the defendant E. Wood.

The defendant being desirous of purchasing a public house plot at Kilburn belonging to A. Maxwell, which had been placed in the plaintiff's hands for sale, agreed to pay the plaintiff 100*l.* for commission on the purchase. The contract was in the following terms:—

"December 17, 1880. Mr. Clack, Dear sir, I am willing to give 1300*l.* for the freehold of the public house plot at the corner of Dart Street; and I hereby agree to give you 100*l.* in commission subject to the title being approved by my solicitor."

The plaintiff thereupon obtained from Maxwell a letter agreeing to accept the defendant's offer of 1300*l.* The purchase from Maxwell was however never completed, the defendant alleging that he had been deceived as to a certain road important to the enjoyment of the property, which was represented on the plan as existing, but which had been stopped.

The effect of the sudden termination of the transaction was that an abstract of title was never sent to the defendant nor approved by his solicitor.

The defendant having refused to pay to plaintiff his commission this action was brought.

The defendant pleaded in his defence that he only agreed to pay the commission on the completion of the purchase which never took place; that the vendor did not give a good title, and that the defendant was reasonably entitled to refuse it, and that the title had never been approved; and further that he had been led into the contract by the false representations of the plaintiff respecting the road.

The action was tried before North, J., in Middlesex, on the 28th of November, 1881, when the jury found all the issues put to

1882

CLACK v. WOOD.

them in favour of the plaintiff, but it did not clearly appear from the Judge's notes what those issues were. His Lordship reserved judgment. Motion for judgment was made the next day, when the judge held that, notwithstanding the finding of the jury, the defendant was entitled to judgment on the ground that the words in the contract "subject to the title being approved by my solicitor," imposed upon the plaintiff the obligation of tendering the title to the defendant and its being approved by his solicitor which had not been done.

The certificate of the associate of the result of the trial was as follows. "The jury found a verdict for the plaintiff for 100*l*. The judge reserved judgment. And on the 29th of November, 1881, after hearing counsel, the judge directed that judgment should be entered for the defendant, and that the defendant should pay the costs caused by the issues raised by the second and third paragraphs of the statement of defence (namely, as to the fraudulent representation), and that the defendant should have the other costs of the action; set off for costs."

From this judgment the plaintiff appealed.

Fillan, and *Poley*, for the plaintiff. The finding of the jury as entered on the record was a general verdict for the plaintiff, and with that verdict the judge had no power to enter judgment for the defendant. If the verdict was wrongly entered the defendant ought to have asked to have it amended at the time, or else ought to have applied for a new trial under Order XXXIX. r. 1; *Davies* v. *Felix*. (1) The Court of Appeal must now take the verdict as correctly entered. But the verdict did in fact amount to a general one for the plaintiff. For he succeeded on all the issues which were put to the jury. We admit that no question was put as to the non-approval of the title by the defendant's solicitor. But that issue was immaterial; the clause in the contract merely meant that the plaintiff's title was to be investigated; *Hussey* v. *Horne Payne* (2); and as the defendant broke off the contract on another ground that term of the contract became impossible by his own act.

Moulton, for the defendant, was not called on.

(1) 4 Ex. D. 32. (2) 4 App. Cas. at p. 322.

1882

CLACK v. WOOD.

JESSEL, M.R. The question we have to decide is one which, I am persuaded, will not often occur, but still it is important, as regards the power of this Court to amend the record of the trial. It is said that the finding of the jury being general in favour of the plaintiff, the judge had no power to enter it for the defendant, which he did, with an exception as to part of the costs. No doubt if the finding of the jury had been really a general verdict for the plaintiff it ought not to have been followed by a judgment for the defendant. It is clear that there must have been a mistake in this case either in what was left to the jury, or in the certificate of the associate as to the finding of the jury. We have consulted Mr. Justice North as to the questions which he put to the jury, and it is clear from his letter to us in reply that whatever words he used he did not intend to leave to the jury any question as to the non-approval of Maxwell's title by the defendant's solicitor, but to reserve that question to himself. Whether he put the issues as clearly to the jury as he might have done is not material, but there was really no question to go to the jury on that part of the case.

The plaintiff did not offer any evidence to the jury of Maxwell's title, or of its approval by the defendant's solicitor. On the other hand, there was evidence given by the defendant that his solicitor did not approve it, although it was not really necessary for the defendant to offer any evidence on that point, because it was for the plaintiff to give primâ facie evidence either that the title was approved, or that there was a good title but that the defendant's solicitor unreasonably and improperly refused to approve it. The plaintiff tendered no evidence on either point, therefore there was no evidence to go to the jury on that question, and no verdict ought to have been taken on it. The proper way of dealing with the case at the time would have been to enter a verdict for the plaintiff on the two issues respecting the fraudulent representations, and then it would have been competent for the judge to deal with the judgment.

The question remains what ought this Court to do now? The orders applicable to the case are Order LVIII., rule 5, and Order LIX., rule 2. If application had been made at the time to the judge, there is no doubt that he could have amended the record

1882

CLACK v. WOOD.

under Order LIX., rule 2, and directed the finding of the jury to be altered. Then Order LVIII., rule 5, says that "the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of first instance:" and again, that "the Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further order as the case may require." Therefore it is plain that we can order the record of the trial to be amended. That having been done the judgment for the defendant must stand; and the appeal will be dismissed with costs.

LINDLEY, L.J. I am of the same opinion. Mr. Justice North was substantially right, but there was an error in drawing up the certificate, which says "the jury found a verdict for the plaintiff for 100*l*." I am satisfied that there was an error in so entering the verdict. What was really done was to leave to the jury the question of fraud, and on that issue the jury found a verdict for the plaintiff. There is no doubt that this Court has power to amend the record. It should be that the jury found a verdict for the plaintiff on the issues as to fraud, and the judge reserved the rest of the case. Then what is the rest of the case? The plaintiff sues on a written agreement, which contains the words "subject to the title being approved by my solicitor." What had the plaintiff to do at the trial? He ought either to have proved that the title was approved or that there was such a title tendered as made it unreasonable not to approve it. But he did neither; so there was no evidence to go to the jury. Mr. Justice North gave judgment for the defendant, on the ground that there was a total absence of evidence on that point. Assuming the certificate to be amended, as it ought to be, his judgment was right in substance, and must be affirmed.

BOWEN, L.J. I am entirely of the same opinion.

Appeal dismissed.

Solicitor for plaintiff: *Ilderton.*
Solicitors for defendant: *Lewin & Co.*

M. W.

HARDING *v.* PREECE.

1882
June 23.

Bankruptcy—Landlord and Tenant—Disclaimer of Lease by Trustee of Assignee—Liability of Lessee for Rent—Liability of Bankrupt's Surety.

The plaintiff being lessee of a farm for a term of years assigned the lease to P., taking the covenant of the defendant as surety for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bankrupt, and his trustee having obtained the requisite leave of the Court disclaimed all interest in the lease. Subsequently the lessor demanded from the plaintiff the half year's rent accruing after the bankruptcy. The plaintiff paid the rent and brought an action to recover the amount from the defendant under his covenant. Neither the plaintiff nor the defendant had entered upon or taken possession of the farm:—

Held, by Manisty and Watkin Williams, JJ., that the plaintiff was entitled to recover. By Manisty, J., on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve the bankrupt, his estate, and the trustee from liability without otherwise affecting third parties, and that the plaintiff as lessee remained liable for the rent and had his remedy over against the defendant as the bankrupt's surety. By Watkin Williams, J., solely on the authority of *East and West India Dock Co.* v. *Hill* (W. N. April 29, 1882).

SPECIAL CASE.

The plaintiff being lessee of a farm had assigned it for the residue of the term to William Goodwin Preece, taking the covenant of the defendant as surety for the due payment of the rent for the residue of the term. During the continuance of the term, Preece became bankrupt and his trustee disclaimed all interest in the premises. The plaintiff subsequently in pursuance of the covenant in his lease paid one half year's rent to the lessor, and now sued the defendant upon his covenant as surety; the question being how far the defendant's liability was affected by the disclaimer. The facts are stated in detail in the judgments of the Court.

May 15, 16. *Yate Lee* (*Rose*, with him), for the plaintiff. It has been held that a disclaimer of a lease by the trustee in bankruptcy of the assignee of the lease does not affect the rights and liabilities inter se of the lessor and original lessee: *Smyth* v. *North* (1); *Ex parte Walton* (2); *Ex parte East and West India*

(1) Law Rep. 7 Ex. 242. (2) 17 Ch. D. 746.

1882

HARDING v. PREECE.

Dock Co. (1); *East and West India Dock Co.* v. *Hill.* (2) If as between the lessor and original lessee the liability to the rent and covenants continues the liability of the sureties upon the covenant to indemnify must also continue.

W. G. Harrison, Q.C. (*English Harrison* with him), for the defendant. The Bankruptcy Act, 1869, provides that upon the disclaimer the lease shall be deemed to have been surrendered from the date of the adjudication. Upon a surrender the term is gone, and with it the rent and covenants: *Ex parte Stephens.* (3) In *Smyth* v. *North* (4) the rent in question had accrued due before the adjudication and disclaimer, and it was reasonable to hold that the vested right of action against a third person could not be interfered with by the disclaimer, but here the rent accrued after the disclaimer. According to the plaintiff's contention the word "surrendered" in the Act as applied to this case must be construed to mean "assigned back to the lessee." The legislature must be taken to have meant "surrendered" when they said "surrendered," and not something wholly different in law. If the term was gone by the disclaimer, it is clear the liability of the sureties to indemnify was gone also. In *Ex parte Walton* (5) the registrar had given leave to disclaim unconditionally, and the decision merely affirms the principle that the trustee need not consider how far his disclaimer may affect other interests. The observation of James, L.J.,—that it was never intended to affect rights and liabilities between the creditor and a third party, "a surety, for instance, is not discharged by the bankruptcy of his principal,"—is extra judicial and contrary to *Smalley* v. *Hardinge.* (6)

Yate Lee, in reply. If the lessor upon a disclaimer takes possession of the demised premises it may be thought contrary to principle that he should remain at liberty to enforce the covenants in the lease. But here the lessor has not accepted possession of the premises, and as regards the liability of the surety the lease must be regarded as still subsisting.

Cur. adv. vult.

(1) 17 Ch. D. 759.
(2) W. N. April 29, 1882.
(3) 7 Ch. D. 127.
(4) Law Rep. 7 Ex. 242.
(5) 17 Ch. D. 746.
(6) 7 Q. B. D. 524.

June 23. The following judgments were delivered:— 1882

HARDING v. PREECE.

MANISTY, J. The facts of this case, stated briefly, are as follows:—

On the 2nd of November, 1871, Messrs. Stoneham and Chance (whom I shall call the landlords) granted a lease to the plaintiff, John Harding, of a farm in Shropshire for fourteen years at the annual rent of 335*l.* 14*s.* 9*d.*, payable half-yearly on the 25th of March and 29th of September, with a covenant by the plaintiff not to assign or part with possession of the property without the consent in writing of the landlords.

In March, 1873, the landlords gave their consent to the assignment I am about to mention without prejudice to their rights and remedies for recovery of the rent reserved by, and performance of the covenants contained in, the lease.

On the 12th of April, 1873, a deed of assignment was executed between the plaintiff of the first part, William Goodwin Preece of the second part, and John Preece of Lichfield and the defendant John Preece of Cressage of the third part, whereby the plaintiff assigned the farm to William Goodwin Preece for the residue of the term of fourteen years, subject to the payment of the rent and the performance of the covenants contained in the original lease. And by the same deed the assignee, W. G. Preece, and the said John Preece, of Lichfield, and the defendant covenanted jointly and severally with the plaintiff that they or some or one of them would pay the rent and perform the covenants in the lease, and would at all times thereafter save, defend, keep harmless and indemnified the plaintiff, John Harding, his heirs, &c., against the payment of the rent and performance of the covenants contained in the lease.

In June, 1880, William G. Preece, the assignee, presented a petition for liquidation of his affairs by arrangement or composition with his creditors; and on the 7th of July the statutory majority of his creditors resolved that his affairs should be liquidated by arrangement. Trustees were appointed, and the resolutions were duly registered on the 10th of July, 1880, pursuant to the Bankruptcy Act, 1869.

On the 6th of July, 1881, the trustees obtained an order of the

1882

HARDING v. PREECE.

Manisty, J.

Court of Bankruptcy that they should be at liberty to disclaim the lease and all the estate and interest of William Goodwin Preece and of the trustees therein. And by a deed poll, under the hands and seals of the trustees, dated the 9th of July, 1881, the trustees disclaimed and renounced the lease and the assignment and all their right and title to the farm.

Shortly after the 29th of September, 1881, the landlords demanded payment by the plaintiff of the half year's rent due on that day, and threatened to bring an action for it in default of payment.

The plaintiff gave notice to the defendant of the demand and threat, and after waiting a reasonable time he paid the rent, and subsequently brought this action to recover the amount from the defendant.

The question raised by the special case is, whether the plaintiff is, under the circumstances, entitled to recover the amount from the defendant.

The answer to that question depends upon the true construction of s. 23 of the Bankruptcy Act, 1869, and the effect of the disclaimer by the trustees.

I have carefully considered the numerous authorities cited in the course of the argument, as well as some others, and have come to the conclusion that the disclaimer by the trustees of the assignee of the lease does not affect the right of the landlords to recover from their lessee, that is the plaintiff, the rent reserved by the original lease, and that the plaintiff has a right to recover it back from the defendant as one of the sureties of the bankrupt assignee.

Having regard to the decisions in *Smyth* v. *North* (1) in 1872; *O'Farrell* v. *Stephenson* (2) in 1879; *Smalley* v. *Hardinge* (3) in March, 1881, and more especially *Ex parte Walton* (4) in May, 1881; *Ex parte East and West India Dock Co. In re Clarke* (5), in June, 1881, and the *East and West India Dock Co.* v. *Hill*, decided by Hall, V.C., on the 4th of April, 1882 (see Weekly Notes of the 29th of April, 1882), it must, I think, be taken for

(1) Law Rep. 7 Ex. 242.
(2) 4 Ir. Law Rep. 715.
(3) 7 Q. B. D. 524.
(4) 17 Ch. D. 746.
(5) 17 Ch. D. 759.

the present at all events, to be the law (and I do not wish to be understood as doubting the correctness of the decision) that a disclaimer under s. 23 of the Act of 1869 by the trustee of an assignee of a lease operates as a surrender only so far as is necessary to relieve the bankrupt and his estate and the trustee from liability and not so as otherwise to affect the rights or liabilities of third parties.

That being so, it follows that the rights of the lessors in the present case, and the liability of the plaintiff as lessee were unaffected by the disclaimer, and the lessors had a right to sue the plaintiff for the rent.

This brings us to the question whether the plaintiff has been deprived of his remedy over against the defendant as one of the bankrupt's sureties. I think he has not. I am unable to see any ground upon which it can be held that the remedy is gone, without also holding, contrary to the decisions to which I have adverted, that the disclaimer by the bankrupt's trustee does affect the rights and liabilities of third parties.

The very object of the lessee in requiring his assignee to find sureties, was to protect himself against the risk of his assignee becoming unable, owing to any circumstance whatever, to pay the rent and perform the covenants in the original lease. It so happens that the circumstance which has arisen is the bankruptcy of the assignee, but it might have been otherwise.

The sureties will have the right to stand in the place of their principal, and if they sustain any loss by their suretyship they will have a right to prove for it against the bankrupt's estate unless it has been caused by their own neglect.

It was contended on behalf of the defendant that the landlords (Stoneham and Chance) have refused to accept the defendant as tenant, and that consequently they have no right to insist upon payment of the rent or performance of the covenants in the original lease. This contention is founded upon the finding contained in the sixth paragraph of the special case. (1) I take the meaning

(1) This paragraph stated that at a meeting between Burd, the representatives of the landlords, the plaintiff, and the defendant's solicitor, the solicitor stated that the defendant was ready to become tenant of the premises and take upon himself all responsibility for the rent and covenants in the lease, but that Burd refused on the ground that the defendant was not the kind of tenant the landlords desired to have.

1882

HARDING v. PREECE.

Manisty, J.

of this paragraph to be simply, that the landlords refused to acknowledge the defendant as their tenant, and in so doing I think they were quite right, but how that can affect the right of the landlords to sue their lessee for payment of the rent, or how it can affect the liability of the defendant as surety for the bankrupt assignee, I am unable to comprehend.

So long as the landlords do not enter and take possession of the farm, I am of opinion that they have the right to call upon their lessee (the plaintiff) to pay the rent and perform the covenants in the lease, and so long as the plaintiff does not enter and take possession, I am of opinion that he has the right to call upon the defendant to indemnify him against payment of the rent and performance of the covenants, and the defendant being so called upon has, in my opinion, the right to possession of the farm, but he has no right to call upon the landlords to accept him as their tenant.

For the reasons assigned, I am of opinion that the plaintiff is entitled to judgment for 167*l.* 17*s.* 4*d.*, with costs.

WATKIN WILLIAMS, J. Being of opinion that the plaintiff is entitled to judgment, my opinion becomes immaterial; but as I entertain doubts upon the correctness of some of the authorities, I have prepared the following separate judgment:—

The plaintiff, John Harding, was at one time the lessee for a term of years of a farm in the county of Salop, which he held at an annual rent of 335*l.* This lease he assigned to one William Goodwin Preece for the residue of the term, taking at the same time the covenant of the defendant John Preece as surety for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term the assignee became bankrupt, or what was equivalent to bankrupt, and his trustee disclaimed all his estate and interest in the land. The plaintiff subsequently, and according to his original covenant, paid the rent to the lessor, and now sues the defendant upon his covenant as surety, and the question is whether the defendant is under the circumstances discharged from this obligation, or whether he is still liable to the rent under the covenant of suretyship. This question depends partly upon the true construction of the 23rd section of the Bankruptcy Act, 1869, and in part upon the effect

produced upon the defendant's contract of suretyship by the condition of things brought about by the disclaimer.

The question presents to my mind very great difficulties. The enactment in question, for the purpose of relieving the bankrupt from all future liability at the same time that he is deprived of all his property, provides that, in a given event, a certain state of things which does not in fact exist shall be deemed to exist, and we have to apply this statutory fiction to a condition of things which probably was not directly present to the minds of the framers of the Act.

In such a case the simple application of the words in their primary and unqualified sense is not always sufficient, and will sometimes fail to carry out the manifest intention of the law-giver, as collected from the statute itself and the nature of the subject-matter, and the mischief to be remedied. When, therefore, the simple application of the words in an unqualified sense leads apparently to some injustice or absurdity at variance with, or not required by, the scope and object of the legislation, it becomes necessary to examine further, and to test by certain settled rules of interpretation, what was the real and true intention of the legislature, and, having ascertained it, then to apply the words if they are capable of being so applied so as to give effect to that intention.

The first thing is to ascertain the true circumstances to which the statute has to be applied. In the present case the material circumstances are as follows:—

On the 2nd of November, 1871, one Stoneham demised to the plaintiff, Harding, a farm in the county of Salop for a term of fourteen years from the 25th of March, 1871, at the annual rent of 335*l.*, payable half yearly, and subject to certain covenants and conditions, amongst which were a covenant to pay the rent reserved, and also a covenant not to assign or part with the possession of the land without the lessor's consent, but during the tenancy to personally inhabit the mansion with his family and servants.

On the 12th of April, 1873, the plaintiff, with the consent of the lessor, given without prejudice to the landlord's rights for the recovery of rent and enforcing performance of the covenants, by deed assigned the farm to William Goodwin Preece for the

1882

HARDING v. PREECE.

Williams, J.

residue of the term subject to the rent, covenants, and conditions reserved and contained in the lease. The defendant was a party to this deed as surety for the assignee, and was a party to the following covenant contained in it:

"And the said William Goodwin Preece and the said John Preece of Lichfield and John Preece of Cressage, as his sureties, do hereby for themselves jointly, and for their heirs, executors, administrators, and assigns, and each of them doth for himself severally, his heirs, executors, administrators, and assigns, covenant and agree unto the said John Harding, his executors, administrators, and assigns that they, the said William Goodwin Preece and the said John Preece of Lichfield and John Preece of Cressage, or some or one of them, their or some of their executors, administrators, or assigns, will at all times hereafter during the said term of fourteen years granted by the said indenture of lease, pay, or cause to be paid, the rent by the same indenture of lease reserved which henceforth shall grow due in respect of the premises hereby assigned, at such times and in such manner as the same is thereby reserved, and also will observe and perform, and keep all and singular, the covenants, conditions, and agreements in the said indenture of lease contained, and which henceforth on the part of the tenant or lessee of the said leasehold hereditaments thereby demised ought to be observed, performed, and kept, and will from time to time, and at all times thereafter, save, defend, keep harmless, and indemnify the said John Harding, his heirs, executors, administrators, and his and their lands and tenements, goods and chattels, against the payment of the said rent and the performance of the said covenants, conditions, and agreements, and from and against all actions, suits, cause or causes of action, costs, charges, damages, claims, and demands whatsoever for or on account of the same or in anywise relating thereto."

On the 14th of June, 1880, William Goodwin Preece presented a petition to the county court of Shropshire for liquidation, and upon the 7th of July the statutory majority of creditors resolved that his affairs should be liquidated by arrangement, and trustees were duly appointed and the resolutions were duly registered on the 10th of July following. On the 27th of November, 1880, the original lessor, Stoneham, the plaintiff Harding, and the defend-

ant Preece, met, either personally or by their authorized agents, when the defendant proposed to take possession of the premises in question, to occupy them as tenant, and to take upon himself all responsibility for rent and in respect of the covenants of the lease. This proposal was assented to by the plaintiff, Harding, but was rejected by the lessor, who positively refused to allow the defendant to enter into possession or to occupy the land, stating that the defendant was not the kind of tenant whom he desired to have. From this I draw the inference and conclusion that under no circumstances and at no time would the lessor permit the defendant to enter and beneficially occupy the farm so far as he had any voice in it.

After some delay the trustees of William Goodwin Preece, on the 9th of July, 1881, having obtained the necessary leave of the Court, disclaimed and renounced the lease and assignment, and all right, title, interest, and property vesting in them as such trustees in all the hereditaments comprised in the lease.

Shortly after the 29th of September, 1881, the lessor demanded from the plaintiff the half-year's rent due on the 29th of September, 1881, and the plaintiff paid the same and has brought this action to recover the amount from the defendant under his covenant.

The surety, on the one hand, contends that by the operation of s. 23 of the Bankruptcy Act, 1869, under the above circumstances, he is discharged from liability upon his covenant, and on the other hand, the plaintiff contends that the liability of the defendant is, under the circumstances, unaffected by the disclaimer under that statute (1), and the main question discussed before us was as to the effect of the disclaimer upon the lease; it

(1) Sect. 23. "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure, burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have

1882

HARDING v. PREECE.

Williams, J.

being argued on one side that it put an end to the term and extinguished all the covenants and obligations in the lease, and on the other, that its effect was merely to discharge the bankrupt and his estate from all liability to the rent and covenants of the lease, leaving all rights, interests, and obligations, as between the lessor and third parties untouched. There appear to be numerous dicta and opinions of learned judges of great weight and authority on each side of the question.

It becomes necessary, therefore, in this conflict of opinion, to examine carefully the cases in which these contradictory opinions have been expressed, and also to consider the application of the established canons of construction to the language of the statute which has been so differently interpreted.

The most direct and striking case is that of *Smyth* v. *North*. (1) That was an action brought by the plaintiff against a lessee for rent. The case of the defendant was, that he had assigned the lease, that the assignee became bankrupt, that the trustee in bankruptcy had disclaimed the property, and that the claim accrued after the date of adjudication, though before the disclaimer.

Martin and Pigott, BB., held, that this afforded no defence, upon the ground that the Act did not apply to the case at all, and that it only affected the question between the bankrupt and his trustee and the lessor, and that it did not destroy the estate nor divest it from the lessee. Bramwell, B., concurred in thinking there was no defence, but based his judgment upon the ground that, as the rent had actually accrued due before the disclaimer, and as there was a vested cause of action for it, the subsequent

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been surrendered on the same date, and if the same be shares in any company be deemed to have been forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section, shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

(1) Law Rep. 7 Ex. 242.

disclaimer did not divest it, and he proceeds to express himself as follows:

"But for the contrary opinion of my learned Brothers, I should have thought it quite clear, that if the rent had accrued after the disclaimer, the defendant would have been entitled to judgment. The words of the Act are quite plain that upon the execution of the disclaimer, the lease shall be deemed to have been surrendered on the date of the adjudication. Now, surrender means the act of surrendering by the lessee and the acceptance of that surrender by the lessor; the one cannot surrender unless the other accepts. Therefore, when the statute uses that word it imports the whole transaction on both sides. But not only are the words plain, but if this were not so, a sort of impossible consequence would follow. Who, on this supposition is entitled to the land? Surely not the bankrupt. . . . . If the landlord is entitled, then the absurdity follows that he has both the land and the rent. It cannot be said the lessee has it, for he has parted with all his interest and there is no provision that it shall revest in him, the statute should on this view have said not that the lease shall be deemed to be surrendered, but to be assigned back to the original lessee. Not only the words of the statute therefore, but the necessary consequences of the provision are in favour of the construction which I have put upon it. It is said that the lessor may thus find himself deprived of the security of a solvent tenant to whom he let his premises at a high rent and get his property thrown back on his hands when rents have fallen. That is a misfortune, but all we can say is that the legislature have not guarded against it, except by giving the lessor the right of proving against the bankrupt's estate for the loss which he has sustained."

In the present case the rent sued for became due after the disclaimer, and according to this opinion of Lord Bramwell the right of the lessor to sue is extinguished.

The above opinion, however, was not an actual decision, and was not necessary for the determination of the particular case, and there is ground for saying that Lord Bramwell shrank from the logical consequence of his own opinion when he decided in favour of the plaintiff.

1882

HARDING v. PREECE.

Williams, J.

In *Ex parte Walton* (1), Jessel, M.R., and James, L.J., expressed strong opinions tending in an opposite direction. In that case Walton having granted a lease to one Levy of certain premises at 70*l.* a year rent, Levy, in consideration of a premium, granted an underlease to one Michaelson at 55*l.* a year rent. Levy became bankrupt, and his trustee, being desirous of disclaiming his now valueless and onerous lease under the provisions of the 23rd section of the Act, applied for leave to the Court as required by rule 28 of the Bankruptcy Rules, 1871. (2) This application was opposed by Walton, the lessor, upon the ground that the disclaimer, by operating as a surrender of the head lease, would deprive him of all remedies for the rent originally reserved, and leave him entitled only to the rent reserved by the underlease. The Bankruptcy Court granted leave to disclaim. From this Walton appealed. The Lord Justices affirmed the decision of the Bankruptcy Court, accompanying their decision with a declaration of opinion that the disclaimer would not produce the injurious consequences to the lessor apprehended by him. Jessel, M.R., in his judgment refers to what Lord Wensleydale called the golden rule for construing all written instruments, namely, that "the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity, or some repugnance, or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further," and proceeds to consider whether a literal construction of the words would be absurd or inconsistent with the object of the Act. "The object of the legislature," he says, "is plain. When a man becomes bankrupt he is not to remain liable to engagements attaching to his property when that property is taken away from him, the legislature intended to set him free from personal obligations attaching to his property. That was one object of the section. Another object was that all his property should be vested

(1) 17 Ch. D. 746.

(2) Rule 28: "Where any property of a bankrupt acquired by a trustee under the Bankruptcy Act, 1869, shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose."

in his trustee . . . and that when the trustee finds that the property will not produce a surplus beyond the liabilities attaching to it he may be able to disclaim it, and so get rid of the property and the liability together. Of course, he is not to keep the property and at the same time get rid of the liability. This was the object of the legislature, and I conceive that it was their only object; it never could have been their intention to confiscate the property of any man. A construction of the section that would lead to such a result might well be described as an absurdity." He then gives as illustrations the cases of shares, or contracts, or leases deposited as security for advances, and proceeds: "If there had been a legal mortgage of the lease by way of underlease at a peppercorn rent, if s. 23 is construed literally, the lessor would by the disclaimer practically lose his property for the benefit of the mortgagee, who would not only get his mortgage money, but would be able to keep the property free from the obligation of paying any rent for it. The results of a literal construction of the section would be so monstrous that such a construction must be considered absurd. . . . Therefore it seems to me that the section must be read as meaning that the property is to be disclaimed inter se, so as not to interfere with the rights of third parties, and only for the benefit of the bankrupt and his estate . . . the general words of the statute are to be limited to the relief . . . of the bankrupt, his trustee, and his estate from liability." James, L.J., expresses himself much to the same effect. He says that when the case was first mentioned he was startled at the consequences which would result from a literal construction of the section. "A lessor," he says, "has a double right, a right in personam on the contract, a right in rem by distress and by the power of re-entry, when a lessee makes a sub-demise the sub-tenant . . . takes the property subject to all the lessor's rights in rem. . . . It would seem to be . . . against principle and against common honesty that a lessee by becoming bankrupt should deprive the lessor of his remedies in rem, or release a sub-lessee from the legal liabilities and obligations to which the property was in his hands liable before the bankruptcy. Is it possible to conceive that the bankruptcy of the sub-lessee should confiscate the lessor's right, and give the sub-lessee an absolute immunity from such distress and

1882

HARDING v. PREECE.

Williams, J.

forfeiture. The object of the bankruptcy laws was merely to regulate the distribution of the bankrupt's assets between his creditors and to relieve the bankrupt and his estate from future liability to his creditors, but it was never intended to affect rights and liabilities as between the creditor and a third party. A surety, for instance, is not discharged by the bankruptcy of his principal. But to revert to the position of lessor and lessee. Take the case of a lease with a surety for the payment of the rent. Could it ever have been intended that the bankruptcy of the lessee was to release the surety?"

The Lord Justice then puts other illustrations of third persons, whose vested interests are supposed to be threatened if the surrender is construed literally; and replying to the contention that the Court ought not to give its assent to the disclaimer, unless satisfied that it can do so without injustice to the lessor or to any one else, and without prejudice to any rights or remedies of or against any third person, he says: "Seeing that that would not give the trustee the immunity it is intended that he should have, the more complete and satisfactory solution of the riddle may be found in the following principle: When a statute enacts that something shall be deemed to have been done which in truth and fact was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now the bankruptcy law is a special law having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and upon this cessio bonorum to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say that when the statute says that a lease which was never surrendered in fact is to be deemed to have been surrendered, it must be understood as saying so, with the following qualification, which is absolutely necessary to prevent the most grievous injustice and the most revolting absurdity, 'shall as between the lessor on the one hand, and the bankrupt his trustee and estate on the other hand, be deemed to have been surrendered.'" Their Lordships made an order dismissing the appeal, prefacing it with a declaration of the opinion of the Court "that

the disclaimer by the trustees will not affect the right of the lessors to recover the rent reserved by and enforce the covenants contained in the original lease by distress or entry."

It was contended before us that this declaration of the law by learned judges not only peculiarly conversant with the law of bankruptcy, but sitting in the Court of Appeal, was both decisive upon the question now before us and binding upon us sitting in a Court of first instance.

In dealing with this contention I must point out, and I do so upon the authority of Lord Selborne, C., discussing this very decision in *The East and West India Dock Company's Case* (1), that this declaration of opinion as to the construction of the Act was wholly beside the question that was before the Court. The question before the Court was whether the trustee should be refused leave to disclaim a leasehold property which he alleged was valueless and burdensome. The question whether the disclaimer would operate injuriously upon the rights and interests of the lessor had no bearing whatever upon this question. If the leasehold which devolved upon the trustee was in fact valueless and burdensome it became equally the right and duty of the trustee under the 23rd section of the Act of Parliament to disclaim it, without taking upon himself the duty of considering the effect upon the rights of others, and r. 28 could in no way affect this statutory right and duty and was made, as alone it could be made by the authority of the 78th section of the Act, in order to give the Court a control over the acts of trustees, and to prevent them from improperly exercising the power of disclaimer contrary to the objects and provisions of the Act. Indeed it seems impossible to deny, and it was admitted by James, L.J. (2), that even if the legal effect of the disclaimer would be to operate injuriously and unjustly upon the rights of the lessor or other persons, that would afford no ground or reason for withholding from the trustee leave to disclaim, if in fact the leasehold estate which had devolved upon him was valueless and burdensome. It comes, therefore, to this, that even if the opinions expressed by the Lord Justices as to the effect of the disclaimer are erroneous, their actual decision in dismissing the appeal and

(1) 17 Ch. D. 759. (2) 17 Ch. D. 756.

1882

HARDING v. PREECE.

Williams, J.

in refusing to withhold the leave to disclaim, would still remain untouched and unimpeached, and this is the view taken by the Lord Chancellor in *The East and West India Company's Case.* (1) In that case the dock company had granted a lease to one Hill for twenty-one years at 300*l.* a year. Hill assigned the lease to one Clarke, subsequently Clarke demised the premises by way of underlease to Truman, Hanbury, & Co., by way of mortgage to secure an advance. Clarke subsequently filed a petition for liquidation and the trustee applied for leave to disclaim, and the registrar having granted leave, the dock company appealed. The Lord Chancellor in dismissing the appeal says, "the rule was evidently made and indeed it only could be made for the effectual execution of the 23rd section of the Act, and of the objects of that section. What were those objects? It appears to us that the object was to cut short by disclaimer all liability of the bankrupt's estate in the classes of cases which are there referred to . . . leaving any person injured by the operation of the section to prove in the bankruptcy for whatever he could establish to be the value of the injury done to him . . . the power is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and for the benefit of all the persons interested in that administration. Therefore, if in a particular case it appears clear that, if looking to that object alone the disclaimer ought to be allowed, the Court would be introducing considerations foreign to the purpose of the legislature, if for collateral reasons connected with the position of other persons, it should refuse to allow it, and thus leave on the bankrupt's estate a burden which under that section might be got rid of, and ought to be got rid of if those collateral considerations did not prevail."

It will be further observed that in the numerous illustrations given by the Lords Justices in their judgments in *Ex parte Walton* (2), no opinion is expressed as to the effect of a disclaimer upon the position of the original lessee, where there has been a bankruptcy of the assignee of a lease. It is true that in the course of the argument James, L.J., put this question to the counsel of the trustee. "Suppose a lessee assigned his lease, and then the assignee became bankrupt, and his trustee disclaimed

(1) 17 Ch. D. 759. (2) 17 Ch. D. 746.

the lease, what would be the effect upon the obligation of the lessee on his covenants?" To which the counsel replied, that it would not affect the liability of the original lessee, and for this he cited *Smyth* v. *North* (1), and this seems to be the only allusion in *Ex parte Walton* (2) to the case of the assignment of a lease and the bankruptcy of the assignee.

It seems to me, therefore, that *Ex parte Walton* (2) cannot be treated as an authority upon the question now before us.

So far, therefore, as these authorities are concerned it still remained to be determined what was the meaning and intention of the legislature when it declared that the property of a bankrupt, if it is a lease, shall upon the execution of a disclaimer by the trustee be deemed to have been surrendered. Does it mean, and did the legislature intend, that upon the disclaimer the term of years should cease and determine, and that upon such determination the estate in the land should revert to the lessor as it would do upon an actual surrender in fact, and so release the bankrupt personally, and his estate from all future liability, direct and indirect, to the rent, and upon the covenants of the lease; or was it the intention merely to release the bankrupt and his estate, by an operation short of an actual surrender, leaving the term and its obligations subsisting, so far as third persons were concerned, unless and until the lessor actually accepted the disclaimer and re-entered upon his estate?

This I conceive to be a correct way of stating the alternative views.

The canons and principles of interpretation of statutes are too well known and too well settled to require any lengthened statement or illustration. Primâ facie the ordinary and grammatical sense of the language, especially if the words used have a well known and technical meaning, is to be adhered to, but as Lord Selborne says in the case of *Caledonian Ry. Co.* v. *North British Ry. Co.* (3): "The more literal construction ought not to prevail if it is opposed to the intention of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

(1) Law Rep. 7 Ex. 242. (2) 17 Ch. D. 746.
(3) 6 App. Cas. 122.

1882

HARDING v. PREECE.

Williams, J.

The duty of the courts of law is undoubtedly to ascertain the intention of the legislature, and to give effect to that intention if the language will admit of their doing so, adding nothing to the language and taking away nothing. "It is the internal sense," says Plowden, "that makes the law, the letter of the law is the body, and the sense and reason of the law is the soul." Where doubts and difficulties have arisen as to the real intention of the legislature in using certain language, no sounder guide has been laid down than the resolutions arrived at by Sir Roger Manwood and the Barons of the Exchequer in *Haydon's Case* (1), namely, that regard should be had, first, to the previously existing state of the law; secondly, to the mischief and defects not provided for by that law; thirdly, to the remedy provided by the legislature; and, fourthly, to the true reason of that remedy. These, as Lord Coke says, "are the very lock and key to set open the windows of the statute." The intention of the legislature is to be thus ascertained from the language actually used: "the Court," says Wigram, V.C., "is not to allow conjectural interpretations to usurp the place of judicial exposition," and although the spirit is to be regarded no less than the letter, yet the spirit is to be collected from the letter, and where courts, in order to escape from hard and unjust consequences, decide that which they think the legislature ought to have enacted rather than what it has expressed they are not expounding but making the laws. The present statute of 1869 is declared in the preamble to be an Act to consolidate and amend the law of bankruptcy, and by a comparison of the previous statutes of 1809 (49 Geo. 3, c. 121), 1825 (5 Geo. 4, c. 16), and 1849 (12 & 13 Vict. c. 106), and the numerous decisions upon them, it will be apparent that a large and sweeping change in the law was intended, the main purposes being, first, the taking away from the bankrupt the whole of his available beneficial property, and its distribution equally amongst his creditors; and, secondly, the complete discharge of the bankrupt from all his liabilities present and future. "The intention," says, James, L.J. (*Ex parte Llynvi Coal and Iron Co.* (2)), was "that every possible demand, every possible claim, every possible liability, except for personal torts, is to be

(1) 3 Coke's Rep. 7. (2) Law Rep. 7 Ch. 28.

the subject of proof in bankruptcy; the broad purview of this Act is that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind, and with regard to onerous contracts as to land or anything else, the trustee may disclaim them altogether, and if he disclaims them the bankrupt is relieved from them, and is no longer liable, and the creditor is entitled to prove for the injury." The question that now naturally arises is, What was the position of a bankrupt before this statute in relation to his leasehold property, and its liabilities and obligations?

From 1809 to 1869 his position was this, that if his assignees in bankruptcy elected to take the land he could not be sued for the rent or upon the covenants in the lease, and if the assignees declined it the bankrupt could not be sued if within fourteen days he delivered up the lease to the person entitled to the rent—under this law questions arose as to the liability of sureties for bankrupt lessees, and as to the liability of original lessees, where the leases had been assigned, and the assignee had become bankrupt; on the one side it was contended that the delivery up of the lease by the lessee operated as a surrender of the lease, and so discharged the lessee or surety as the case might be. It was, however, decided that the statutes merely gave a personal discharge to the bankrupt, leaving original lessees and sureties liable on their personal covenants: *Manning* v. *Flight* (1); *Inglis* v. *McDougal* (2); *Welsh* v. *Welsh* (3); *Tuck* v. *Fyson.* (4)

The practical effect of this state of the law was that on the one hand the lessor, if he accepted a lease so returned to him and retook possession of the land, was without any redress for loss or injury if the land were of less annual value than the rent reserved, and on the other hand if he did not accept the lease, the liability of the surety, or of the original lessee, as the case might be, upon their personal covenants remained to the end of the term, and as they could not come in and prove under the bankruptcy in respect of these liabilities, they were entitled to sue the bankrupt who by this indirect and circuitous process remained liable for the rent, although he had given up his lease.

(1) 3 B. & Ad. 211.
(2) 1 B. M. 196.
(3) 4 M. & S. 333.
(4) 6 Bing. 321.

1882

HARDING v. PREECE.

Williams, J.

The position of sureties for the payment of annuities granted by bankrupts was precisely similar to this under the statute of 1809, but was altered by the statute of 1825, by which it was enacted that an annuity creditor of a bankrupt should not sue the surety until the annuitant had proved under the bankruptcy for the value of the annuity, and if the surety paid the amount so proved he was discharged, and if he did not pay the amount then he could be sued for the accruing amounts of the annuity as they became due until the annuitant should be paid the amount proved together with interest at 4 per cent., and then the certificate should be a discharge to the bankrupt against all claims of the surety, who was throughout to be entitled to the benefit of the annuitant's proof upon the estate.

This was the position of things when the statute of 1869 was passed, and this Act having in view the objects already referred to, enacts that when any property of a bankrupt consists of a lease burdened with onerous covenants, the trustee may disclaim the property, and upon the execution of the disclaimer the lease shall be deemed to have been surrendered, and any person injured thereby shall be deemed a creditor to the extent of the injury; and the question now arises whether it was the intention of the statute that it should or should not be any longer optional with a lessor to accept or reject the giving up to him of the land in the hands of a bankrupt tenant; on the one side it is said that it never could have been the intention of the legislature that these words should be applied literally and in their simple and primary sense, because that would have the effect not merely of relieving the bankrupt and his estate, but of destroying and confiscating the right of the lessor against third parties, which could not have been intended; and therefore the language of the Act, in order to avoid such monstruous and absurd consequences, must be read with a qualification; with regard to this argument, I may point out that a large number of the unjust consequences alleged would not in fact follow from a strict application of the language in its technical and established sense; an actual surrender, in fact, of a lease never could have had any greater effect than a grant of the real and beneficial interest which it was in the power of the surrenderers to surrender, it operated merely as a grant, and the

surrenderee came in under the grant, all vested rights and interests carved out of the surrendered lease would remain unaffected by the surrender.

The best illustration of this is the case of *Bradshaw* v. *Davenport* (1), which was an action of quare impedit of the vicarage of Orton, which was appendant to the rectory of Orton in Leicestershire, and the case was this. The Earl of Huntingdon being possessed of the rectory for a term of fifteen years granted the next presentation of the vicarage if it should happen to become void during the term to the plaintiff. The earl died, and his successor surrendered the residue of term in the rectory to the Bishop of Oxford then in reversion, and the bishop then demised the rectory to the defendant, and afterwards, but within the fifteen years, the vicarage became void. It was held that, although the term was in rei veritate determined before the vicarage became void, yet according to the real meaning of the grant, the vicarage was vacated during the term.

To return to the position of the lessor, he in fact would have his land, and if he was injured he would be entitled to claim upon the estate for the amount of his loss, and could hold the surety responsible to the same amount. On the other hand, if the disclaimer is not to operate as a surrender in the full sense of the word, this consequence follows, that after a disclaimer a surety would be responsible for the rent and upon the covenants for the whole residue of the term, and would be entitled to prove as a creditor for the capitalized value of this liability, and thus the bankrupt's estate, although deprived of the property, would be liable to a proof not merely for the amount of injury sustained by the lessor, but for the capitalised value of the rent for the whole residue of the term, a result which might make it more disastrous for the trustee to disclaim a burdensome and valueless property than to accept it with its burdens; nor does it appear to me that the power of the Court to order possession of disclaimed property to be delivered up to persons interested in it extends to delivering up a disclaimed lease to a surety; I think that provision only applies to cases where the applicant is entitled to possession.

(1) 8 Coke, 144.

1882

HARDING v. PREECE.

Williams, J.

From these considerations I should have thought that it was still an open question for determination whether or not the surrender intended by the statute was not a surrender in its well known and proper meaning with all its logical consequences; but my attention has since I have entered upon the consideration of this question been called to a very recent and still unreported decision of Vice-Chancellor *Hall* in a case of the *East and West India Dock Co.* v. *Hill*, in April, 1882, in which he appears to have directly decided the point, and has held the lessee liable for rent accruing due after the date of the disclaimer, holding that the surrender is of a limited and qualified character only.

Under these circumstances, I do not consider that I am at liberty to treat the question as an open one, and that I am bound in obedience to the decision of a Court of co-ordinate jurisdiction to hold that the surrender has not discharged the plaintiff or the defendant from their obligations upon their covenants.

Judgment for the plaintiff.

Solicitors for plaintiff: *Chester, Mayhew, Broome, & Griffithes.*
Solicitors for defendant: *Sole, Turner, & Knight.*

A. P. S.

June 12.

HEAVEN *v.* PENDER.

Negligence—Breach of Duty—Defective Article, Supply of—Injury to Stranger—Liability of Person supplying a defective Article causing Injury to Stranger.

The defendant supplied and erected a staging round a ship under a contract with the shipowner. The plaintiff was employed by the shipowner to paint the ship, and in the course of the work fell from the staging and was injured by reason of a defect in its condition. In an action for damages:—

Held, that the defendant had no duty towards the plaintiff to supply a reasonably safe staging, and therefore was not liable.

Winterbottom v. *Wright* (10 M. & W. 109) followed: *George* v. *Skivington* (Law Rep. 5 Ex. 1) disapproved of.

Rev'd on appl 11 QBD 503 A

ACTION in the Bow County Court to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant.

1882

HEAVEN v. PENDER.

The material facts appearing on the judge's notes were as follows:—

The plaintiff, a ship-painter, was employed by Gray, a master painter, to paint a ship lying in the defendant's dock for repairs.

Gray was employed to paint the ship by the shipowner. A staging round the ship was supplied to the shipowner by the defendant, and put up by him, but he had no control over the plaintiff during the progress of the painting. The plaintiff whilst painting was standing on a plank forming part of the staging when one of the guy ropes gave way, causing the plank to shift and the plaintiff to fall into the dock, whereby he was severely injured. The staging had been put up on the same day that the accident happened. The rope, when examined after the accident, appeared to have been burnt at the place where it broke, but there was no evidence to shew its condition when the staging was put up, or that the defendant or his servants had any knowledge that the rope was defective.

The county court judge gave judgment for the plaintiff for damages, of which the amount was agreed upon by the parties.

A rule nisi having been obtained to shew cause why judgment for the defendant or a nonsuit should not be entered, on the grounds that there was no evidence of any liability on the part of the defendant to the plaintiff, and that the defendant was entitled to judgment on the facts proved by the plaintiff at the trial:—

A. Charles, Q.C. (*C. C. Scott,* with him), shewed cause. The defendant, who supplied the staging with the knowledge that it would be used by painters, is liable. No question of privity of contract arises. The liability depends upon a duty by the defendant to supply a reasonably safe staging, and the principle applies of the decisions in *Indermaur* v. *Dames* (1), *Smith* v. *London and St. Katharine Docks Co.* (2), and *Smith* v. *Steele.* (3) In the last case the principle is stated by Blackburn, J., thus: "The law is to a certain extent determined by the case of *Indermaur* v. *Dames.* (1) There is an obligation on the part of the occupier of

(1) Law Rep. 1 C. P. 274; 2 C. P. 311. (2) Law Rep. 3 C. P. 326.
(3) Law Rep. 10 Q. B. 125.

1882

HEAVEN v. PENDER.

property, whether fixed or moveable, to those who at his invitation, express or implied, come on that property to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger; and that obligation extends to the workmen sent by a tradesman to repair part of the machinery."

Bompas, Q.C. (*H. F. Dickens*, with him), supported the rule. The cases cited for the plaintiff differ from this. In *Indermaur* v. *Dames* (1) there was an invitation to the plaintiff to come upon the property by the owner, and in *Smith* v. *London and St. Katharine Docks Co.* (2), the gangway which the defendants provided remained in their possession and under their control. In the present case there is no evidence of any invitation from the defendant to the plaintiff, and the staging after it was erected was in the possession and control, not of the defendant, but of the shipowner, who is the person liable: *Francis* v. *Cockrell.* (3) *Winterbottom* v. *Wright* (4) is a direct authority in the defendant's favour. The declaration in that case stated that the defendant took upon himself the sole and exclusive duty of repairing the coach, which he provided under a contract with the Postmaster General, and the defendant was held not liable to the person employed to drive the coach for injuries sustained through its defective condition. The same principle has been adopted in *Longmeid* v. *Holliday* (5), *Blakemore* v. *Bristol and Exeter Ry. Co.* (6), and *Collis* v. *Selden.* (7)

Charles, Q.C., was allowed to reply. *Langridge* v. *Levy* (8) lays down the doctrine that where there is fraud in warranting an article supplied, and damage results, the party guilty of the fraud is responsible to the party injured, and that doctrine has been extended to negligence by *George* v. *Skivington.* (9) There the Court held that the defendant had a duty towards the female plaintiff to supply a reasonably fit article, Kelly, C.B., saying that the duty was similar to that in *Langridge* v. *Levy* (8),

(1) Law Rep. 1 C. P. 274; 2 C. P. 311.
(2) Law Rep. 3 C. P. 326.
(3) Law Rep. 5 Q. B. 184, 501.
(4) 10 M. & W. 109.
(5) 6 Ex. 761.
(6) 8 E. & B. 1035.
(7) Law Rep. 3 C. P. 495.
(8) 2 M. & W. 519; 4 M. & W. 337.
(9) Law Rep. 5 Ex. 1.

whilst Cleasby, B., said "substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge* v. *Levy* (1) and this case is complete." If *George* v. *Skivington* (2) is inconsistent with *Winterbottom* v. *Wright* (3), it is submitted that the later case *George* v. *Skivington* (2) should be followed, but the distinction may be suggested that in *Winterbottom* v. *Wright* (3) no contract of any kind was alleged; the only allegation being that the defendant had improperly hung a chandelier in a house. The defendant in the present case must be taken to have been an occupier of the staging, or his position was analogous to that of a landlord, who is liable for injury to a stranger caused by the defective condition of the premises where the landlord has contracted with the tenant to repair them, or is guilty of misfeasance by letting them in a ruinous condition: *Nelson* v. *Liverpool Brewery Co.* (4); *Pretty* v. *Bickmore* (5); *Payne* v. *Rogers* (6); *Todd* v. *Flight* (7); *White* v. *France.* (8)

FIELD, J. I am of opinion that the rule should be made absolute. The question is whether or not the plaintiff has sued the wrong person. It is undoubted that he was injured by falling from the staging through the defective condition of one of the ropes which supported it, though it does not appear whether the defect was there when the rope was supplied by the defendant. The fact that the rope broke is perhaps primâ facie evidence of the defendant's want of care in supplying it, but in order to support the action the plaintiff must shew either the existence of a contract between himself and the defendant and a breach by the defendant, or that some relation existed between them which created a duty from the defendant to the plaintiff to use due and reasonable care, and that the defendant was guilty of a breach of that duty. No doubt there are railway and other cases in which occupiers of property have been held liable who have simply invited upon their premises persons in pursuit of their lawful business, and then a duty is created to take due and reasonable

(1) 2 M. & W. 519; 4 M. & W. 337.
(2) Law Rep. 5 Ex. 1.
(3) 10 M. & W. 109.
(4) 2 C. P. D. 311.
(5) Law Rep. 8 C. P. 401.
(6) 2 H. Bl. 349.
(7) 9 C. B. (N.S.) 377; 30 L. J. (C.P.) 21.
(8) 2 C. P. D. 308.

1882

HEAVEN v. PENDER.

care that the premises are not in a dangerous condition. That principle was well settled by *Indermaur* v. *Dames* (1), which has been followed by many subsequent cases. I agree with what was said by Blackburn, J., in *Smith* v. *Steele* (2) that there is no distinction to be drawn between fixed and moveable property in applying the principle; it makes no difference whether a person as occupier of property invites another upon it, or supplies a thing to be used by another. The case of *Smith* v. *London and St. Katharine Docks Co.* (3) exemplifies this; there the dock owners supplied a gangway to be used in obtaining access to the ship from the shore. They took upon themselves the duty of providing a roadway in fact to the ship, and having moved it so that it became insecure, they were held responsible for injury to the plaintiff caused thereby. But there is nothing here analogous to the cases founded on an invitation. If it had been shewn that after the defendant supplied the staging he had any control over it, or might have moved it away, or prevented persons going on it; or if there had been any evidence to bring him into the position of an occupier, in the sense of having the dominion and control over the thing supplied, the case would then have fallen within the principle of the cases I have referred to: but there is no such evidence. I think the evidence shews that the defendant parted with the control of his staging as a landlord does with the control of his property when he lets it. A landlord who reserves to himself, under his contract with the tenant, the duty of repairing walls is in a different position, because there he has the control over them, and a right of entry, for the purpose of repairing.

There is no contract between the plaintiff and defendant here; no fraud on the defendant's part; no breach of a duty to tell the truth, as in *Langridge* v. *Levy*. (4) I agree that there is no substantial distinction between the present case and *George* v. *Skivington*. (5) The distinction that in *George* v. *Skivington* (5) the defendant knew that the article supplied was to be used

(1) Law Rep. 1 C. P. 274; 2 C. P. 311.
(2) Law Rep. 10 Q. B. 125.
(3) Law Rep. 3 C. P. 326.
(4) 2 M. & W. 519; 4 M. & W. 337.
(5) Law Rep. 5 Ex. 1.

by the plaintiff's wife, does not appear to make any difference. The point was clearly discussed and decided in *Winterbottom* v. *Wright*. (1) There the defendant, who supplied the coach, knew that it would certainly be used by some coachman. If ever the duty which is relied on here to create a liability existed, it was in that case, but the Court of Exchequer held that the public inconvenience caused by holding the defendant liable under such circumstances would be so great, that, in the absence of any principle compelling them so to hold, they gave judgment for the defendant. That decision has been followed in *Longmeid* v. *Holliday* (2), and many other cases. The only doubt thrown upon it is by *George* v. *Skivington* (3), which I agree is an authority standing by itself in favour of Mr. Charles' contention. I prefer to follow *Winterbottom* v. *Wright* (1) rather than *George* v. *Skivington*. (3)

CAVE, J. I am of the same opinion. Where a licensee goes upon or uses the property of his licensor for purposes in which the licensor is interested, there is a duty cast upon the licensor to see that the licensee is not exposed to unusual danger; and for a breach of that duty the licensor is responsible. The rule applies equally where the property is land or a thing to be used as the staging was here; the duty arises out of the possession and control of the thing—not out of the property in it. The only authority which can be cited in support of the plaintiff's case is *George* v. *Skivington*. (3) I think that case is inconsistent with *Winterbottom* v. *Wright* (1), unless it can be distinguished, on the ground that the duty owing from the vendor to the purchaser is extended to the purchaser's wife where the article is, to the knowledge of the vendor, bought for her use. If it cannot be distinguished, I must follow *Winterbottom* v. *Wright* (1) in preference to *George* v. *Skivington*. (3) The case of *Nelson* v. *Liverpool Brewery Company* (4) is not in point; but there are some dicta in it which appear to support Mr. Charles' contention. The cases, however, upon which those dicta are founded are all clearly distinguishable from the present case. It lies upon the plaintiff here

(1) 10 M. & W. 109.
(2) 6 Ex. 761.
(3) Law Rep. 5 Ex. 1.
(4) 2 C. P. D. 311.

1882

HEAVEN v. PENDER.

to shew that the defendant was his licensor; that the defendant had the possession and control of the staging, and that it was by his permission the plaintiff came to be upon it when he was injured. I think there is no evidence of these essential conditions, and therefore that the ruling was wrong, and the defendant entitled to judgment.

Rule absolute.

Solicitor for plaintiff: *E. J. Anning.*
Solicitors for defendant: *Watson, Sons, & Room.*

W. A.

June 13.

BEATTY AND OTHERS, APPELLANTS; GILLBANKS, RESPONDENT.

Unlawful Assembly—Meeting for lawful Purpose—Knowledge that others will commit a Breach of the Peace.

The appellants assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it:—

Held, by Field and Cave, JJ., that they could not be rightly convicted of an unlawful assembly.

AT a petty sessions held at Weston-super-Mare, the appellants were charged for that they did unlawfully and tumultuously assemble with divers other persons to the number of one hundred or more in public thoroughfares called Walliscote Road and other places within the said parish on the 26th day of March, to the disturbance of the public peace, and against the peace of our sovereign Lady the Queen. Upon the hearing of such complaint the justices found that the allegations therein contained had been proved, and ordered the appellants to be severally bound in their own recognizances, with two sureties, to keep the peace and be of good behaviour for the term of twelve calendar months, and in default to be imprisoned for three calendar months, or until they should comply with such order. The appellants being dissatisfied with such determination the justices stated the following case:—

At the hearing of the complaint the following facts were proved:—

(*a.*) The Salvation Army is an organized body of persons who

are and have for some time been in the habit of forming themselves into processions of more than one hundred persons, and in such processions of parading the principal streets and public places of the town of Weston-super-Mare.

(*b.*) These processions are formed at the hall of the Salvation Army, and after their formation proceed, headed by a musical band and flags and banners, through the aforesaid streets and places, collecting, and for the purpose of collecting as they go, a mob of persons with whom, attended by much shouting, singing, uproar, and noise, they eventually return to the said hall, where a meeting is then held.

(*c.*) The appellant, William Beatty, is captain and a leader of the Salvation Army, and organizes and directs these processions and meetings.

(*d.*) The appellants, William Henry Mullins and Thomas Bowden, are also leaders of the Salvation Army, and assist in organizing and directing the processions.

(*e.*) There is another organized band of persons at Weston-super-Mare called the Skeleton Army, who also parade the streets, and are antagonistic to the Salvation Army and its processions.

(*f.*) There are numbers of other persons of Weston-super-Mare who, so soon as the Salvation Army has formed for the purpose of so parading the streets as aforesaid, are in the habit of assembling in a mob of great numbers about, and around, and in front of, the Salvation Army. Some of these, together with the Skeleton Army, assemble to dispute the passage of the Salvation Army through the streets and places, some to encourage such passage with shouting, uproar, and noise, to the great terror, disturbance, annoyance, and inconvenience of the peaceable inhabitants of the town, and to the endangering of the public peace.

(*g.*) On several occasions previous to the 23rd of March in this year, the procession of the Salvation Army, accompanied by such a mob as aforesaid, has come into collision with the Skeleton Army and other persons who are antagonistic to the Salvation Army, and thereupon a free fight, great uproar, blows, tumult, stone throwing, and disorder has ensued.

(*h.*) On the 23rd of March the Salvation Army formed their

1882

BEATTY v. GILLBANKS.

procession, and paraded the streets and places accompanied by a disorderly and riotous mob of over 2000 persons, who had been collected as the Salvation Army proceeded. In the midst of the mob was fighting and great disturbance, stone throwing, and noise. The police were for a long time overpowered and unable to cope with the disturbance, and the Salvation Army forced their way through several public streets to a public place called the Railway Parade, where a general fight occurred. The appellant, William Beatty, led and directed the Salvation Army on this occasion, but neither he nor the other appellants were seen to commit any overt act of violence. The police were ultimately reinforced, and the crowd then dispersed. In all probability bloodshed and injury was prevented by the interference of the police.

(*i.*) The matters in the last paragraph set out caused great terror and alarm in the minds of the peaceful inhabitants of the town, who believed, and had good reason to believe, that the aforesaid processions would lead to a repetition of the aforesaid matters and would endanger life, property, and the public peace, and who in consequence brought the matter to the notice of the sergeant of police in charge of the town, and made divers complaints to him thereon.

(*j.*) In consequence of the matters aforesaid the notice annexed to this case was issued and signed by two of the justices of the peace acting for the division: copies of the notice were placarded in the conspicuous parts of the town and were served on the appellant Beatty.

(*k.*) On Sunday, the 26th of March, at 10.30 A.M., whilst numbers of the inhabitants of the town were proceeding to their respective places of worship, the Salvation Army, under the direction of the appellants, was formed into a procession of one hundred or more persons, and having been so formed commenced to march away from their hall through the streets and public places of the town. The appellants marched at the head of the procession, which was surrounded by a tumultuous and shouting mob of some hundred persons, which rapidly increased as the procession moved on.

(*l.*) The police sergeant met the procession (after it had paraded

through certain principal and public streets) in a public street called Walliscote Road, and with others of the police force stopped the advance of the procession and asked the appellant William Beatty if he was leading the procession and if he had received a copy of the notice. The appellant Beatty said that he was leading the procession, and that he had received one of the notices. The sergeant told the appellant Beatty that he must obey the notice, and that he must desist from leading the procession and must disperse at once or he would be arrested. The appellant William Beatty refused to comply, and marched on at the head of the procession some twenty yards farther and told the sergeant he should still proceed, whereupon he was arrested. After he was arrested the appellant Beatty shouted to the procession to proceed. The appellants, William Henry Mullins and Thomas Bowden, then took the direction of the procession and persisted in leading it on, whereupon they also were arrested. Neither of the appellants was guilty of any overt act of violence other than the acts aforesaid, and submitted quietly to their arrest.

(*m.*) The aforesaid assembling of the Salvation Army and march of the procession and collection of the mob was a terror to the peaceful inhabitants of the town and to the persons going to their places of worship as aforesaid, and was calculated to endanger and did endanger and was calculated to cause a breach of the peace, and there was good and sufficient cause for the inhabitants to suppose, and any rational person knowing the aforesaid circumstances would suppose, that unless the said procession and mob were dispersed there would be a repetition of the aforesaid violent and tumultuous acts, and that there would be a breach of the peace.

(*n.*) The appellants intended to parade their procession through the principal streets and public places of the town, and to collect on their march a large mob of persons to accompany them, and they had good reason to expect that they would come into collision with the Skeleton Army and the other persons antagonistic to themselves, and had good reason to expect that there would be the same fighting, stone throwing, and disturbance as there had been on previous occasions, and intended on meeting such

1882

BEATTY v. GILLBANKS.

opposition to force their way through the streets and places as they had done on previous occasions.

It was contended for the appellants that there had not been any unlawful and tumultuous assembling on their part, that they had not been guilty of the charge and complaint made against them, and that their arrest had been unlawful and that they should be discharged.

The following is the notice above referred to :—

"Public Notice: Whereas it hath been made to appear unto us, the undersigned two of Her Majesty's Justices of the peace for the county of Somerset, acting in and for the division of Axbridge, in the same county, upon the oath of divers persons, that riotous and tumultuous assembly did take place on the night of the 23rd of March, 1882 in certain public streets at Weston-super-Mare, in the said county; and, further, that there are reasonable grounds for apprehending a repetition of such riotous and tumultuous assembly in the public streets of Weston-super-Mare aforesaid, and we do therefore hereby require, order, and direct all persons to abstain from assembling to the disturbance of the public peace in the public streets, within the said parish of Weston-super-Mare."

The questions for the opinion of the Court were, whether the aforesaid facts found to be proved as aforesaid constituted the offence charged in the information and complaint, and whether the order made against the appellants was valid.

E. Clarke, Q.C. (*Sutherst*, and *L. C. Jackson*, with him), contended that to constitute an unlawful assembly there must be either an illegal object, or if the object be legal, the mode of carrying it out must be tumultuous; that neither had been made out, and that the intention of other persons to commit unlawful acts could not affect the question whether there had been an offence by the appellants: *Reg.* v. *Vincent* (1); *Reg.* v. *Neale* (2); *Redford* v. *Birley*. (3)

A. R. Poole (*Valpy*, with him), for the respondent, contended that any meeting assembled under such circumstances as, according

(1) 9 C. & P. 91. (2) 9 C. & P. 431.

(3) 3 Stark N. P. 76.

to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly: *Reg.* v. *Vincent* (1), and that the justices were entitled to look to what had taken place on previous occasions. The object of the appellants was to collect a mob of persons although they must have known that if they did so a disturbance would arise; and under these circumstances, whatever their ultimate object, the assembly was unlawful.

E. Clarke, Q.C., was not called on to reply.

FIELD, J. I am of opinion that this order cannot be supported. The matter arises in this way. The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use that word, which they desire to further among certain classes of the community. No one imputes to this association any other object, and so far from wishing to carry that out with violence, their opinions seem to be opposed to such a course, and, at all events in the present case, they made no opposition to the authorities. That being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such an assembly is in itself an unlawful one. The appellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is, that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before they can be convicted it must be shewn that this offence has been committed. There is no doubt that they and with them others assembled together in great numbers, but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such, as on several previous occasions, had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants

(1) 9 C. & P. 91.

1882

BEATTY v. GILLBANKS.

knowing when they assembled together that such consequences would again arise are liable to this charge.

Now I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.

In Hawkins' Pleas of the Crown, s. 9, it is said, "An unlawful assembly according to the common opinion is a disturbance of the peace by persons barely assembling together with the intention to do a thing which if it were executed would make them rioters, but neither actually executing it nor making a motion toward the execution of it." On this definition, standing alone, it is clear that the appellants were guilty of no offence, for it cannot be contended that they had any intention to commit any riotous act. The paragraph, however, continues thus, "But this seems to be much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no man can foresee what may be the event of such an assembly." Examples are then given, but in each the circumstances of terror exist in the assembly itself, either in its object or mode of carrying it out, and there is the widest difference between such cases and the present. What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of

1882

BEATTY. v. GILLBANKS.

the justices whether the facts stated in the case constituted the offence charged in the information must therefore be answered in the negative.

CAVE, J., concurred.

Judgment for the appellants.

Solicitors for appellants: *Whittington & Son.*

Solicitors for respondent: *Crowder, Anstie, & Co., for C. J. Simmons, Axbridge.*

A. M.

[IN THE COURT OF APPEAL.]

June 26.

WEBBER *v.* LEE.

Frauds, Statute of—29 *Car.* 2, *c.* 3, *s.* 4—*Right of Shooting*—*Right to take away Game shot*—*Interest in Land.*

A grant of a right to shoot over land and to take away a part of the game killed is a grant of an interest in land and within the Statute of Frauds.

FURTHER CONSIDERATION.

This action, tried before Bowen, J., on the 21st of June, 1881, was brought to recover damages for breach of an agreement that in consideration that the plaintiff would permit the defendant to share certain shooting rights and a certain shooting box the defendant would pay 100*l.* and one-fourth of certain charges incurred by the plaintiff. The agreement proved at the trial was a verbal one to pay 100*l.* for one-fourth share of the shooting for the season over certain lands, the plaintiff paying all expenses of every sort connected with the shooting, and the defendant to be entitled to accommodation in a house rented by the plaintiff and to one-fourth part of the total game killed.

The jury found a verdict for the plaintiff for 40*l.*, but the question was reserved for further consideration whether the contract was one within the Statute of Frauds and ought to have been in writing.

1881, Dec. 10. *McClymont*, for the plaintiff. This is not an

1882

WEBBER v. LEE.

agreement relating to an interest in land. In *Wright* v. *Stavert* (1), Blackburn, J., said: "The best test of the nature of the contract is to see whether, had it been carried out instead of remaining executory, the defendant would have had a right to maintain a possessory action of some sort, if his possession and enjoyment of the premises had been afterwards interfered with." That test shews that this was a mere license to the defendant to go on to the land and shoot, for on the breach of the agreement by the plaintiff the defendant could not have taken out the keepers and shot nor brought an action of trespass. The plaintiff stocked the land, hired keepers, and managed everything, and the defendant had only the right to shoot and to take away, not the game he killed, but a proportion of all the game shot. A license is revocable unless coupled with an interest: Hall on Profits à prendre, 73; *Thomas* v. *Sorrell* (2); and the mere appropriation of a certain amount of the game killed is not an interest, but amounts in effect to the sale of a quantity of game to be ascertained. The difference between a demise and a license for the use of land is illustrated by shares in a mine conducted on the cost book principle: *Powell* v. *Jessopp* (3), *Watson* v. *Spratley* (4); and the letting of a dock: *Wells* v. *Mayor of Kingston-upon-Hull.* (5) A license to enter land can be given by parol, as in the case of the use of an opera box: *Tayler* v. *Waters.* (6) [He also cited *Wood* v. *Lake* (7); *Wood* v. *Manley* (8); *Smith* v. *St. Michaels.* (9)]

Anstie, for the defendant, was not called on.

BOWEN, J. I am of opinion that the plaintiff must fail. The contract relied on is a parol one professing to give a right to go on certain grounds and exercise the right of sporting over them and to carry away a definite portion of all the game killed. The question is, whether this is an agreement to grant a right over coupled with an interest in the land, or only an agreement for a

(1) 2 E. & E. 721.
(2) Vaugh. 330.
(3) 18 C. B. 336.
(4) 24 L. J. (Ex.) 53.
(5) Law Rep. 10 C. P. 402.
(6) 7 Taunt. 374.
(7) Say. 3.
(8) 11 Ad. & E. 34.
(9) 3 E. & E. 383.

license to go on the land. I think there clearly was to be participation in the profits although the defendant was only to carry away a definite and limited part of the game killed. It is said that the cases cited shew that there is no interest in land professedly dealt with in the present case, but I cannot agree to that. In each case the principle was not in dispute, but the decision turned on the particular circumstances. Thus *Wright* v. *Stavert* (1) was decided on the ground that no interest in land passed on the contract to board and lodge the defendant. In *Wells* v. *Mayor of Kingston-upon-Hull* (2) the plaintiff did not get such an exclusive possession of the wharf as to give him an interest in land. In *Watson* v. *Spratley* (3) it was pointed out that the agreement, to take shares in a mine conducted on the cost book principle, was one that merely gave the shareholder an interest in a proportionate part of the profits of the undertaking and conferred no interest in the land, though the employment and use of the land were essential to the making of the profits. Here the defendant was to have a right to go upon the land itself, and in answer to the question whether he could have brought an action for trespass if the contract had been completed, I think if the grant had been effectual he could have done so. The case of a box at the opera, *Tayler* v. *Waters* (4), is also distinguishable from the present. What was given there was a right of admission to the Opera House, and the Court held that this was a license to enjoy an amusement on land, and not a grant of an interest in land. The difference in the present case is that there was to be profit à prendre. Had the contract been to give the defendant merely the run of the land for shooting the case might have resembled that of *Wright* v. *Stavert* (1), but the distinction arises from the fact that with that right is joined the right to take away a portion of the profits derived from the land. Under these circumstances, though the plaintiff has the verdict of the jury, I think there must be judgment for the defendant with costs.

Judgment for the defendant.

The plaintiff appealed.

(1) 2 E. & E. 721. 6 Jan 1867

(2) Law Rep. 10 C. P. 402.

(3) 24 L. J. (Ex.) 53.

(4) 7 Taunt. 374.

A. M.

1882

WEBBER v. LEE.

1882. June 26. *McClymont* for the plaintiff. The agreement between the plaintiff and the defendant did not relate to an interest in land within s. 4 of the Statute of Frauds; the defendant was simply to come upon the plaintiff's land, to shoot the game, and to take away one-fourth of what had been killed; it was no more than a licence to enter upon land, which may be granted without writing: *Tayler* v. *Waters.* (1)

[BRETT, L.J. The decision in that case related to an alleged right to enter an opera house: it has not much bearing upon the present appeal.]

It at least shews what an interest in land really is. An agreement to allow coals to be stacked on land is a mere license: *Wood* v. *Lake.* (2) It must be admitted that a grant to a person, his heirs and assigns, of free liberty with servants or otherwise to come into and upon lands, and there to hawk, hunt, fish, and fowl, is a profit à prendre: *Wickham* v. *Hawker* (3); but a right of that kind is very different from that in question in this suit. The defendant was to have no exclusive possession of the game that was killed until it had been divided, and therefore no interest in land was intended to be conferred: *Wright* v. *Stavert* (4); *Wells* v. *Kingston-upon-Hull.* (5)

E. Clarke, Q.C., and *Anstie*, for the defendant, were not called upon to argue.

JESSEL, M.R. I think that this case has been properly decided. The right to shoot game and to take it away when shot has been decided to be an interest in land and a profit à prendre. The only question is whether the verbal agreement sued upon was intended to be a contract for a right of a similar nature. Now, it is clear that the plaintiff might by contract allow any other person to enjoy the right of shooting over his land. By the agreement sued on the defendant was to have one-fourth of the game shot; and I think that an agreement for one-fourth is just as much a contract for an interest in land as an agreement for the whole of the game shot. The facts are brought within the doctrine as to incorporeal rights, and the Statute of Frauds applies.

(1) 7 Taunt. 374.
(2) Say. 3.
(3) 7 M. & W. 63.
(4) 2 E. & E. 721.
(5) Law Rep. 10 C. P. 402.

1882

WEBBER v. LEE.

BRETT, L.J. It cannot at the present day be denied, that when a right to shoot and take away game has been created by grant, that is by deed, it is a profit à prendre, and that an agreement for the enjoyment of it is a contract for an interest in land and falls within s. 4 of the Statute of Frauds. This is the law as it has been ascertained by decisions; although as to the latter point, perhaps, I should have had some difficulty in assenting if the question were open. The right which the plaintiff professed to demise was one-fourth share of the shooting over certain lands and one-fourth part of the game killed. The right to take the whole would have been a profit à prendre; and therefore the right to take a part must be of the same nature. It seems to me that s. 4 of the Statute of Frauds applies.

COTTON, L.J. Upon the cases it is clear that the right to kill and take away game is a profit à prendre, and an agreement for the enjoyment of it is a contract for an interest in land; it is therefore within s. 4 of the Statute of Frauds. I have felt some doubt as to the construction of the agreement as proved at the trial; it was stipulated that the defendant should have one-fourth, and a difficulty might have arisen if the parties could not agree how the game should be divided: nevertheless, as the defendant was to have a right to go over the land and shoot the game and receive a part of what was shot, it was a right to kill and take away game: it therefore fell within s. 4 of the Statute of Frauds. I think that the appeal must be dismissed.

Judgment affirmed.

Solicitor for plaintiff: *Jacobs.*
Solicitor for defendant: *J. P. Murrough.*

J. E. H.

1882
March 29.

[IN THE COURT OF APPEAL.]

THOMSON *v.* THE SOUTH EASTERN RAILWAY COMPANY.
THE SOUTH EASTERN RAILWAY COMPANY *v.* THOMSON.

Practice—Staying Proceedings—Order directing that One of Two Cross Actions be stayed, and that a Counter-claim be delivered in the other—Burden of Proof—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.

When an order is made under the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7, to stay one of two cross actions between the same parties arising out of the same matter, the action brought against the party on whom the burden of proof lies ought to be stayed, and the action brought by him ought to be allowed to proceed, the other party to the litigation being at liberty to raise by defence, set-off, and counter-claim, all questions intended to be raised by him in the action which is stayed.

In an action, commenced on the 28th of November, 1881, the plaintiffs, Messrs. T., claimed 7000*l.*, the balance of the price of a steamship built by them for the defendants, a railway company, and certain other sums as extras; in a cross-action, commenced on the 30th of November, 1881, the railway company as plaintiffs claimed a return of all the moneys paid by them to Messrs. T. on account of the steamship and 15,000*l.* damages, and in the alternative 50,000*l.* damages. Upon the facts the burden of proof lay upon the railway company. The Queen's Bench Division ordered that the action brought by the railway company should be stayed, with liberty to raise their claim by way of counter-claim in the action brought by Messrs. T., on the ground that Messrs. T. had been the first to commence legal proceedings:—

Held, reversing the decision of the Queen's Bench Division, that as the burden of proof lay upon the railway company, the action brought by the railway company should be allowed to proceed, Messrs. T. being at liberty to raise all questions by counter-claim, and that the action brought by Messrs. T. should be stayed.

THOMSON *v.* THE SOUTH EASTERN RAILWAY COMPANY.

The writ in this action was issued on the 28th of November, 1881. The claim, dated the 5th of December, 1881, after alleging that the plaintiffs were a firm of shipbuilders at Glasgow, stated that by an agreement dated the 18th of March, 1880, the plaintiffs agreed to build for the defendants a steamship according to certain plans and specifications therein mentioned for the sum of 35,000*l.*, payable by five instalments of 7000*l.* each, the fifth and last instalment to be payable when the steamer had been completed

and delivered; that the plaintiffs built and completed the steamship and delivered her on the 9th of October, 1880, to the defendants, who accepted her; that the defendants had paid to the plaintiffs the sum of 28,000*l.*, and that there became on the 9th day of October, 1880, and was still due and owing to the plaintiffs the sum of 7000*l.* the balance of the purchase-money; that it was subsequently agreed by the plaintiffs and the defendants that the plaintiffs should do certain extra work in connection with, and make certain alterations in, and supply materials and stores to, the steamship, and the plaintiffs did make and supply the same accordingly, and there was due to the plaintiffs in respect thereof 2736*l.* 7*s.* 11*d.*; that the plaintiffs paid various sums of money for the defendants at their request amounting to 37*l.* 10*s.*; that all things were done, conditions fulfilled, and times elapsed, necessary to entitle the plaintiffs to be paid the sums of 7000*l.*, 2736*l.* 7*s.* 11*d.*, and 37*l.* 10*s.* but the defendants had not paid any of them. The plaintiffs claimed the sums of 7000*l.*, 2736*l.* 7*s.* 11*d.*, and 37*l.* 10*s.* with interest thereon at five per cent.

THE SOUTH EASTERN RAILWAY COMPANY *v.* THOMSON.

The writ in this action was issued on the 30th of November, 1881. The claim, dated the 29th of December, 1881, alleged that on or about the 18th day of March, 1880, an agreement was entered into between the plaintiffs (therein called the company) and the defendants (therein called the builders), whereby the builders and the company mutually agreed that the builders should build for the company a paddle-wheel steamer according to the specifications thereunder written and the plans thereto annexed, and in the manner, and with the materials, and according to the conditions therein contained, and should deliver the steamer to the company at the Tail of Bank in the river Clyde or at Glasgow; that the builders should supply and pay for a sufficient staff of competent engineers to bring the steamer from the Clyde to Folkestone Harbour; that the steamer should be built and completed under the direction and to the satisfaction of the directors of the company, or of such person or persons as they might appoint as their delegate for that purpose, and should include all

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

things which in the opinion of the directors or of such delegate might fairly be inferred from the plans or specifications, though not specially mentioned or described therein, or which in such opinion might be desirable or necessary: that the steamer should be constructed so as to attain a speed of not less than seventeen knots and a half an hour, and that if it should happen that from any cause whatever the steamer should fail to attain the speed of seventeen knots and a half an hour, the company might refuse to accept her, and thereupon the contract should be at an end, and the company should be entitled to recover from the builders all moneys which should have been paid to them by the company, with interest thereon at the rate of five per cent; that if any work should be found to have been constructed in an inferior manner, or with defective or inferior materials, or otherwise not in accordance with the specifications and plans, the builders should make good the same to the satisfaction of the directors of the company or their delegate: that the company should purchase the steamer for the sum of 35,000*l.* payable by five equal instalments. The claim further alleged that in pretended pursuance of the agreement the defendants constructed a steamer, but she did not attain the speed of seventeen knots and a half an hour, she was not built according to the plans and specifications, that she was unseaworthy and was useless and worthless to the plaintiffs, that she was carelessly and unskilfully built, and that much of the workmanship and material was of inferior quality. The claim further alleged that the plaintiffs insisted that they were entitled to refuse to accept the steamer, and thereupon the following agreement was entered into:—

"Memorandum between Messrs. James & George Thomson and the South Eastern Railway Company, this 26th day of May, 1881.

"Messrs. James & George Thomson having made the following proposal to the company, with reference to the steamer, *Duchess of Edinburgh*:—

"'We will take the ship to Deptford and have everything made perfect and strong, and, as soon as completed, we will run her as often across the channel on our own responsibility as you may require, and test her in every way to your entire satisfaction.

"'James & George Thomson.'

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

"The company accept such proposal without waiving their right to reject the steamer, and without prejudice to their rights under the contract or to their claims against Messrs. Thomson . . . . and subject to this further express condition, that if the steamer should again fail within a period of six months from the time when such steamer shall have been re-delivered to the company at Folkestone Harbour, then Messrs. Thomson will take back the steamer and return the purchase-money with interest; but this condition shall not restrict or limit the rights of the company in any respect whatsoever."

The claim further alleged that the defendants, in accordance with the above-mentioned memorandum, took the steamer to Deptford, and in or about the month of August, 1881, returned her to the plaintiffs at Folkestone Harbour: that the defendants did not have everything made perfect or strong, nor did they ever test the steamer to the satisfaction of the plaintiffs, and within six months from the time when the steamer was returned to the plaintiffs, she again failed within the meaning of the memorandum above set out: that the plaintiffs, at various times, paid to the defendants on account of the contract of the 18th of March, 1880, sums amounting in the whole to 28,000*l.* The plaintiffs claimed, first, the return of all moneys paid by them to the defendants on account of the said contract, and 5*l.* per cent. interest thereon from the times of such respective payments, and 15,000*l.* damages: secondly, in the alternative, in case the plaintiffs were not entitled to refuse to accept the steamer, and to receive back the moneys paid by them to the defendants, they claimed 50,000*l.* damages.

It appeared from the correspondence that when the dispute arose in the autumn of 1881 as to whether the steamer had been built and finished in accordance with the contract and the memorandum of arrangement of May, 1881, the South Eastern Railway Company had both by their secretary and also by their solicitor threatened litigation.

An order was made by a master at Chambers that all further proceedings in the action, *Thomson* v. *South Eastern Ry. Co.*, should be stayed, and that the two actions should be consolidated, and that the South Eastern Railway Company should be at

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

liberty to proceed with the action, in which they were plaintiffs, and that the defendants, Messrs. Thomson, should be at liberty to deliver a defence and a counter-claim. The master decided on the ground that as the claim of the South Eastern Railway Company was the larger, they ought to be the plaintiffs. An appeal from the master's order was dismissed by Watkin Williams, J., on the ground that as the South Eastern Railway Company had first threatened litigation, they ought to be the plaintiffs. On appeal to the Queen's Bench Division (Field, J., and Huddleston, B.) the order of the master was reversed, and it was ordered that all proceedings in the *South Eastern Ry. Co.* v. *Thomson* should be stayed, and that the plaintiffs in that action should raise their claim by way of counter-claim in *Thomson* v. *South Eastern Ry. Co.* The grounds of the decision of the Queen's Bench Division are sufficiently stated in the judgments of the Court of Appeal.

The South Eastern Railway Company appealed to the Court of Appeal.

March 25, 29. *Sir H. James, A.G.*, and *Bremner*, for the South Eastern Railway Company. The question is as to the consolidation of these two actions, viz., who ought to be made the plaintiffs and who the defendants, and whose claim should be converted into a counter-claim. The 7th sub-sect. of s. 24 of the Judicature Act, 1873 (1), empowers the High Court and Court of Appeal to grant all such remedies as the parties may appear entitled to in respect of any legal or equitable claim, so that all matters in controversy may be completely determined and multiplicity of proceedings concerning any such matters avoided. The

(1) By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-s. 7, "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

Divisional Court directed that Messrs. Thomson should be the plaintiffs, and that the railway company's claim should be raised only by way of counter-claim, because the writ in Messrs. Thomsons' action was issued first, but there is no arbitrary rule that in the case of cross actions the one who first issues the writ is to be the plaintiff in the action which is to be allowed to proceed. The Court ought to exercise its discretion in the matter, and make that party the plaintiff, on whom the substantial burden of proof would lie, and in the present case such party would be the railway company.

A. C. Nicoll (*Webster, Q.C.*, with him), for Messrs. Thomson. As Messrs. Thomson were the first to take legal proceedings, they ought not to be deprived of the right to begin. Their action is upon the original contract, and they also sue for extras. The South Eastern Railway Company have taken possession of the steamship; but they deny that she has been properly finished, and they allege that she does not fulfil the conditions of the contract. No cases can be cited from the Courts of Common Law, for no jurisdiction existed in them to make an order like that which has been made in the present case; and it cannot be supported by any of the rules under the Supreme Court of Judicature Acts, 1873, 1875: in fact it can only be upheld under the powers conferred by the Act of 1873, s. 24, sub-s. 7; but the practice of the Court of Chancery in administration suits, and also of the Court of Admiralty, is somewhat in point. In *Zambaco* v. *Cassavetti* (1), it appears to have been laid down that where the first of two administration suits was stayed by reason of a decree in a second suit, the plaintiff in the first suit would ordinarily have the carriage of the decree. In the Court of Admiralty, when the claimants were in pari conditione the Court would give priority to the suitor who first obtained a decree: *The Markland.* (2)

Sir H. James, A.G., in reply. If the argument for Messrs. Thomson is allowed to succeed, it will follow that a plaintiff, who has a claim for 21*l.* only, but who is the first to issue a writ, will be entitled to prosecute his action against a defendant who may have a cross-claim for 21,000*l.*; and that the defendant can assert his cross-claim only by way of counter-claim, and any

(1) Law Rep. 11 Eq. 439. (2) Law Rep. 3 A. & E. 340.

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

action brought by him will be summarily stayed. This will introduce an unsatisfactory practice. It would be better to allow each action to proceed separately than to uphold the order of the Queen's Bench Division; and it is to be observed that the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7, does not in express terms warrant such an order as has been made in the present case; but at all events the action brought by the railway company ought to be allowed to proceed, for the burden of proof lies on them. From the authorities collected in 1 Daniell's Chancery Practice, 5th ed. ch. 19, s. 1, p. 698, it is evident that no strict rule existed as to which of two administration suits should be stayed.

BRETT, L.J. This seems to me to be a question of very great importance as to the administration of justice under the Judicature Acts. I think the constant efforts of the Courts since the passing of the Judicature Acts have been, and I think have properly been, to so construe the Judicature Acts, and all the rules and orders under them, as to make as few absolute or unconditional, or what is called hard and fast rules, as can possibly be, and to make the interpretation of the Acts and all the rules and orders so large that the Courts can (unless they are prevented by the words of the statutes) exercise a discretion in each particular case so as to do that which is most just and expedient between the parties. It seems to me that these applications were made, and could be effectually made only under s. 24, sub-s. 7, of the Judicature Act, 1873, and therefore that which has happened and the judgments given in the Divisional Court oblige us to consider what is the proper mode of administering this peculiar jurisdiction upon such a point as is now raised. What is the meaning of sub-s. 7 of s. 24 of the Judicature Act, 1873? Now it seems to me that the judgment of Field, J., reduced the matter to a hard and fast rule, and it seems to me that his judgment goes to this extent, that where there are cross-actions between two parties, if the Court does exercise the jurisdiction not of consolidating them, but of staying the one and insisting that the claims between the two parties shall be tried in the other, the Court is bound ex necessitate to say that the plaintiff in the action

which is allowed to proceed shall be the person who of the parties to the cross-actions was the first to issue a writ: in other words, that the action which is to be stayed is the one which was begun last, and that the matter must be tried in the action which was begun first. It seems to me that the judgment of Field, J., lays that down as an absolutely hard and fast rule. It seems to me that the judgment of Huddleston, B., is not the same as that of Field, J., as to what the hard and fast rule is, but that it enunciated another hard and fast rule, a somewhat larger, but still a hard and fast rule. He adds, that the rule must be applicable unless it is necessary to do otherwise for the administration of justice, or for saving the time of the Court. If the judgment of Huddleston, B., is taken to be to the effect that there is a discretion in the Court as to the best mode of administering justice, I agree with him as to the enunciation of the principle, and our judgment must then depend upon whether we agree as to the exercise of that discretion in this particular case. Now I desire to carry out what I have said has been the rule of conduct, as far as I know, in all the Courts and upon both sides of the Court of Appeal ever since the passing of these Acts. I desire to keep the exercise of the jurisdiction given to the Courts under this sub-s. 7, as large as I can, so as to enable the Court to do what is right and just in each particular case between the parties. I therefore think that there is no hard and fast rule, in the case of cross actions, that the one which was commenced last must be the one to be stayed. I think that the judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties: if there is nothing to guide him, but who was the first to issue out the writ, I should say that it would be a wise and proper mode of exercising the discretion to give that party the advantage which he has got by his diligence. For instance, if the burden of proof (and I only give this as an instance) is as much on one side as on the other with reference to separate parts of the transaction, then I should think that the person who has issued the first writ would have gained the advantage, and that the action in which he is plaintiff ought to be the action which is to be carried on. But it seems to

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

Brett, L.J.

me, that if all the substantial burden of proof is upon the person who is plaintiff in the action which was begun second, it is not conclusive as to a fair and just mode of trying the dispute between the parties to stay the action in which he would begin who has the substantial burden of proof as to all the controverted matters. It would be unfair to deprive him of being the plaintiff and so having the right to begin, and it would be hard to make him the defendant although all the burden of proof lies upon him, and so to give his antagonist the power of anticipating him in matters which but for the order of the Court he could not do. Therefore, it seems to me that the judge must consider what is the fair mode of trying that which is shewn to be the substantial matter, when it will come before the jury. If this be true, of course the grounds of the judgments in the Court below—the grounds at all events of the judgment of Field, J.—are grounds to which we cannot accede, and to which I do not accede. Whether I accede to the grounds of the judgment of Huddleston, B., depends upon what is the proper interpretation of that judgment. I do not agree with the reasons given for any of the decisions which have taken place with reference to this matter. I certainly do not agree with the reported reasoning of the master that the decision depended solely upon the question of which was the greater claim in point of money. I do not agree with that which is reported to have been the reason of the decision of Williams, J., namely, that he ought to be the plaintiff who has first threatened litigation. I have said already that I do not agree with the strict interpretation of the rule which has been applied by Field, J., and perhaps by Huddleston, B. Our order will be that which Williams, J., made in chambers, but our reasons will be different. Messrs. Thomson were the first to bring an action or to issue a writ. They are builders of a steamboat under the first contract and their action is brought and must be brought for the balance of the agreed price of that steamer, and their action is brought, and must be brought upon the written contract which was entered into with reference to the building of that steamer. Their action is brought for the instalment upon the assertion, that the time for payment of that instalment has expired and it has not been paid. It is the last instalment, and they also bring their action for certain extras. Before the Judicature

Acts the defendants would have had no defence as to the payment of the price. By the terms of the contract it seems to me that the ship was to be delivered at Glasgow on a certain day; there was in that contract one condition precedent to the liability of the company to accept the ship, and that condition precedent seems to me to be this, that the vessel was to attain a certain rate of speed at a particular place upon a given mode of trial; and the stipulation in that contract is express that if the ship does not fulfil that condition precedent, the railway company, the purchasers, shall have a right to reject the ship and to put an end to the contract. Now it seems to me to follow from a true interpretation of that contract that that trial was to take place in the Clyde, close to, immediately after, or at all events immediately before, the actual delivery of the ship to the company. If the ship did not come up to the agreed rate of speed, the company had a right to reject the ship; but they were not bound to reject her. Suppose the ship made 16½ knots or 17 knots an hour, it might well be that they would not wish to reject her. They might accept her, but they might nevertheless have certain remedies which I will mention presently. It was a condition precedent that she should attain an agreed rate of speed; but that condition precedent might be waived. It seems to me therefore that if she did not attain the speed of 17½ knots an hour the company might have rejected her, but then they were bound to reject under the ordinary conditions of a power to reject. They must reject within a reasonable time, and before they have allowed Messrs. Thomson to incur any more expense under the contract. They must not delay so as to alter the position of Messrs. Thomson. Therefore it being a stipulation in the contract that the ship was to be delivered to the company in the Clyde, but that the builders of the ship were to be at the cost of supplying engineers to take her to Folkestone, it seems to me that if the company came to the conclusion that she did not attain the 17½ knots an hour at the trial they were bound to reject the ship in the Clyde before they allowed Messrs. Thomson to incur the expense of supplying engineers to take her to Folkestone, and that if they did not reject her then they could not exercise their power of rejection afterwards. So far, therefore, as the question of delivery and

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

Brett, L.J.

acceptance is concerned, a delivery does not necessarily import an acceptance; but if the thing is actually delivered, and the party who has taken delivery has not exercised his right of rejection, then he can never be allowed to say he has not accepted. A delivery without the power of rejection being exercised is both a delivery and an acceptance. Therefore it seems to me that the company were in this position, that they did not reject that ship; but then if that be so, the condition precedent was turned immediately into a contract; and if there is a breach of that contract, and if they can shew that they have suffered any substantial damage by reason of the ship not going the 17½ knots an hour, they would have a right of action for a breach of the contract. There are many other stipulations in the contract in favour of the purchasers, but none of them give the right of rejection, and therefore it seems to me that this company having accepted delivery of the ship, and having overstayed their time to reject her, never could have rejected the ship under the first contract, and all that they could have done was to maintain an action for breaches of the contract, and for damages. If that is so, the action for those breaches of the contract would, under the old system, have been a cross action, and they could not have pleaded it as a defence against the claim for the price, and under the new system those breaches of contract cannot be pleaded by way of set-off as a defence against the claim; they can only be pleaded in the action brought by Messrs. Thomson by way of counter-claim, and a counter-claim is not a defence to the claim, but it is in the nature of a cross action to the claim. Therefore it seems to me, according to the facts of the case, that at the trial what Messrs. Thomson will have to prove will be, that the ship was built and was delivered to the defendants who accepted her, and that the time for the payment of the last instalment was out, and if they prove that, they will primâ facie be entitled to the price. But if they had gone on with their action, the defendants might have supported a counter-claim for the breaches of contract, which might have overtopped the price still due by a considerable amount. But then it was said that the defendants might allege that the last instalment was not due, and that that would be a defence, and I agree to that; that would be a defence. But then the whole

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

Brett, L.J.

burden would lie upon the company to shew that although the time specified for the payment of the last instalment has passed, nevertheless they are not bound to pay it on account of the deficiencies which have not been made good within six months, and the whole burden of proof would lie upon them as the defendants. Therefore it seems to me that in the existing state of facts with regard to the first contract, the whole burden of proof of any deficiencies in the construction of this ship would be upon the railway company. The next thing that happened was, the ship having been delivered and taken by the railway company from the Clyde to Folkestone and used at Folkestone by them, she was found in their opinion to be defective, and thereupon, upon their complaint to the builders, Messrs. Thomson, they entered into the second agreement. Now, that second agreement will be used in two ways; it will be used against them as an admission in the matter with reference to which the burden of proof will be upon the railway company, namely, that there were deficiencies in the ship under the first contract. But the only manner in which it can be used as a cause of action is that it gives a cause of action to the railway company—it gives no cause of action to Messrs. Thomson. It cannot be said that it was taken in satisfaction of the first contract, because it contains nothing about the price which is due to Messrs. Thomson. The latter can only recover the balance of the price by suing on the first contract, and that being so, it is impossible to say that the second would be taken in satisfaction of the first, so as to replace it. It can therefore be used only by the railway company as giving a cause of action. Now what is that cause of action? The cause of action which that second contract gives to them is this, that if the ship is unsatisfactory under the first contract the ship is to be taken back by Messrs. Thomson, and they are to try to remedy the defects complained of, and if they were not successful it might be that the railway company would not have been bound to accept the ship a second time. It may be so; but they did take the ship again. Then there was this further stipulation in the contract, that even though the company took back the ship supposing that Messrs. Thomson had cured the defects, yet if she failed again within six months, not only should the company have a right of

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

Brett, L.J.

action against Messrs. Thomson, but the latter should take the ship back, and the company should not be deemed to have accepted her, and Messrs. Thomson should repay the company the whole price which had been paid on her from the beginning to the end. That is the obligation that Messrs. Thomson took upon themselves, but the whole burden of proving that the railway company had a right to put such an obligation as that upon Messrs. Thomson would be upon the company. They would have to prove that the ship, of which they again took delivery, was then, or within six months at all events afterwards was in such a state that they were entitled to tell Messrs. Thomson to take her back and to repay to them the whole of the price that they had paid for her. Therefore it seems to me upon the first contract that all the real burden of proof with reference to the condition of the ship would be upon the railway company; that on the second contract the whole burden of proof from the beginning to the end lies upon the railway company; and therefore, in the trial of the disputes between these parties, it seems to me that the substantial burden of proof of the whole lies upon the railway company. I think that the learned judge in Chambers, if he had taken that view as to the interpretation of the sub-section which I have tried to enunciate, would have rightly exercised his discretion by saying that under the circumstances of this particular case the advantage of the first writ cannot countervail the hardship which would be imposed upon the railway company, upon whom the whole burden of proof lies and must lie, namely, the hardship of putting upon them that burden of proof, and yet of allowing the other party to have the first and last words. He ought to have considered that the act of issuing of the first writ was countervailed here by other considerations, and that the right discretion for him to use would be to make the order which in fact he did make.

Now, as far as I am concerned, it only remains to be said that the cases relied upon by the learned judges in the Divisional Court do not seem to apply to the exercise of the jurisdiction given to the Courts under this 7th sub-section. As to the cases of collision in the Admiralty Court, no doubt they were cross-actions with regard to the same transaction between the same plaintiff and the same defendant; the Court of Admiralty never

did and could not do what we are allowed to do now. That Court never stopped one action and said that the whole case must be tried in the other action. It had only jurisdiction to say that the two actions should be tried together, and then upon considering that there was to be the same evidence with regard to the same question, it directed the party whose action was first entered for trial should stand first. This was the invariable rule at common law, when the parties by consent agreed that two cross-actions should be tried together; naturally the one that was first entered stood first upon such an order by consent as that. With regard to cases of salvage decided in the Court of Admiralty the practice of the Equity Courts was followed, which was that where several plaintiffs were proceeding against the same defendant in regard to the same cause of action, or the same transaction, and where the suits were what is called consolidated and tried together, as between the different plaintiffs the first plaintiff would be the one who had what is called the carriage of the suit. That does not apply in this case where there are not several plaintiffs and where the actions are between the same parties. I know it is said that each of the parties is a plaintiff and that each of them is a defendant, but it is not the case of several plaintiffs in the same sense as in the salvage cases which have been cited from the Admiralty Court. Then with regard to administration suits and similar suits in the Court of Chancery, there was the same doctrine and there was the same application of it as in the salvage suits in the Admiralty Court, that is to say, where two separate persons had brought separate suits for the administration of the same estate the Court prevented the two suits going on, and insisted that they should be, so to speak, tried together; and it was directed that the first plaintiff as against the second plaintiff should be the person who should have the carriage of the suit. That again is not applicable to the jurisdiction given to this Court.

Thinking that this is a very important matter, and that we are bound to state our view of what the law is as to the conduct of this action, and not agreeing with the strict interpretation which has been put upon the enactment by the judges of the Divisional Court, I am of opinion that the decision of the Judge in Chambers

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

ought to be confirmed, and that we must reverse the decision of the Divisional Court.

HOLKER, L.J. In this case the Court of Appeal is called upon to exercise jurisdiction, so far as I know, for the first time under the powers conferred by the Judicature Act, 1873, s. 24, sub-s. 7. It is a jurisdiction not exactly to consolidate actions but to prevent the multiplicity of actions, by directing that instead of there being two actions between the same parties there should be only one. I do not know that I agree with my learned Brother in thinking the proceeding so very important; it rather shews me the enormous and the undue importance that the parties to actions attach to the right of having the last word. As far as I can make it out, the right to the first word and the last is not such a substantial advantage as both these parties seem to think. But no doubt it is of importance that as the question has to be decided it should be decided on clear and intelligible principles, and it is to my mind a very difficult question. It is difficult because the mind of the Court is left without very much principle to guide it, but my Lord has endeavoured to lay down some principle upon which a matter of this kind should be decided, and I must say that in all that he has said upon that subject I agree with him. I do not think this is a case which can possibly be decided by any fixed rule or by any hard-and-fast rule. The circumstances from the beginning to the end must be heard, and in one case one consideration may have more sway, more cogency, and more effect than that same consideration, perhaps, may have in another. The reasoning of the learned judges who have dealt with this matter has not satisfied my mind with regard to the principles which they have adopted. As I understand, the master finds the rule to be this, that the most substantial claim prevails; but I cannot think it would be just to let the most substantial claim prevail, or have precedence simply because it is the most substantial. No doubt the question which is the larger claim may be sometimes material, but it is not the decisive question. The judge at Chambers was of opinion that the party who has first threatened litigation ought to have the conduct of proceedings. I do not think that a sufficient ground. Then the Divisional

1882

THOMSON v. SOUTH EASTERN RAILWAY CO.

Holker, L.J.

Court held that the party who first brought an action should be entitled to the benefit of his diligence, and that he should prevail over the other. At first sight it seems that there is very considerable force in that. If a man is diligent and more diligent than his opponent and has taken care to secure for himself an advantage, it may be fairly said he should have some consideration for that. But, then, after all it may turn out in such a litigation as this, that it was an accident or that it was a misfortune on the part of his opponent, and in the present case it seems to have been simply a misfortune. Therefore, thinking over these grounds that have been advanced, it does not seem to strike me as being very reasonable that any of these principles standing alone and unaffected by anything else in the case should prevail. In such a matter as this I cannot be confident, but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial, and to have the control of the action.

Appeal allowed.

Solicitors for Messrs. Thomson: *Clarke, Rawlins, & Clarke.*

Solicitor for the South Eastern Railway Company: *W. R. Stevens.*

J. E. H.

EYNDE *v.* GOULD.

May 1.

Practice—Attachment—Notice of Motion—Order XLIV., r. 2.

Under Order XLIV., rule 2, a motion for an attachment for removing goods out of the custody of the sheriff can only be made on notice.

Jupp v. *Cooper* (5 C. P. D. 26) considered.

T. W. Chitty moved for an attachment against a person for removing goods out of the hands of the sheriff, which had been taken by him under a writ of fi. fa. He asked for a rule nisi, as was granted in *Jupp* v. *Cooper* (1), inasmuch as no notice of motion had been given.

(1) 5 C. P. D. 26.

1882

EYNDE v. GOULD.

[LORD COLERIDGE, C.J. Order XLIV., rule 2, expressly provides that "no writ of attachment shall be issued without the leave of the Court or a judge, to be applied for on notice to the party against whom the attachment is to be issued." In *Jupp* v. *Cooper* (1) all that the attention of the Court was called to was, whether the rule should be absolute in the first instance or only a rule nisi.]

The service of a rule nisi will operate as a notice. *In re Phillips and Gill* (2) it was held that a rule to pay money awarded under an agreement of reference which has been made a rule of Court, is a rule to shew cause, and no notice of application for such rule need be given. By Order LIII., rule 3, "except where by the practice existing at the time of the passing of the said Act" (the Judicature Act, 1873,) "any order or rule has heretofore been made ex parte absolute in the first instance, and except where by these rules it is otherwise provided, and except where the motion is for a rule to shew cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order ex parte, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or judge may think just; and any party affected by such order may move to set it aside." Here, serious mischief is suggested as likely to result from delay.

LORD COLERIDGE, C.J. The words of Order XLIV., rule 2, are perfectly plain and unambiguous; and, if they are to be taken to mean what they say, a rule for an attachment cannot be entertained unless notice has been given. No notice having been given here, this rule must be refused.

GROVE, J., concurred.

Rule refused.

Solicitors for plaintiff: *Bell, Brodrick, & Gray.*

(1) 5 C. P. D. 26. (2) 1 Q. B. D. 78.

J. S.

[IN THE COURT OF APPEAL.]

1882
May 25.

WILLIAMS *v.* MERCIER.

Husband and Wife—Married Woman—Liability of Separate Estate for Debts contracted before Marriage—33 & 34 Vict. c. 93, *s.* 12—*Practice—Interpleader—Power of Court of Appeal—Orders I., r.* 2, *XL., r.* 10.

A married woman was sued without her husband for debts contracted before her marriage. By her ante-nuptial settlement it was agreed that all property coming to her or to her husband in her right during the coverture should be vested in two trustees, except jewels which were to be for her separate use. The creditors obtained judgment and issued execution against her separate estate. The sheriff seized jewels which belonged to her before her marriage, and an interpleader issue was ordered between her husband and the execution creditor. The jury found that the jewels belonged to the husband:—

Held, by the Court of Appeal, on an application for a new trial, that the jewels belonged to the wife for her separate use, and that the execution creditor was entitled to seize them;

That the creditor was right in suing the wife without making her husband a party;

That the Court of Appeal had power under Order XL., rule 10, to order judgment in the interpleader issue to be entered for the execution creditor without directing a new trial.

ACTION in the Queen's Bench Division by Marie Mercier, milliner, of Park Street, Grosvenor Square, against Florence Williams, a married woman, for the price of goods supplied to her before her marriage with her husband, Thomas A. H. Williams. Her husband was not joined as a defendant in the action.

The plaintiff obtained judgment in her action for 1090*l.* 5*s.* 4*d.*, being the amount of the debt claimed, and costs.

On the 30th of September, 1881, the plaintiff levied execution on the goods of Mrs. Williams, and seized certain jewels in the house of her husband in South Audley Street, to an amount exceeding the judgment debt. The husband claimed the jewels, and an interpleader issue was directed between him and Madame Mercier, in which the issue was whether the goods which were seized were at the time of the seizure the property of Thomas A. H. Williams as against Madame Mercier.

The jewels were presents which had been given to Mrs. Williams

1882

WILLIAMS v. MERCIER.

before her marriage; and Madame Mercier contended that they were now her separate estate.

The settlement made previously to the marriage, dated the 21st of March, 1881, contained a proviso that all real and personal property to which the said Florence Williams (then Florence Farquharson) or the said T. A. H. Williams in her right, at any time during her intended coverture should become entitled, whether in possession, reversion, or otherwise, except jewels, trinkets, ornaments of the person, and articles of the like nature, which it was thereby declared should belong to Florence Williams for her separate use, and except also any legacy acquired at one and the same time not exceeding 300*l.*, should be assigned and transferred to the trustees of the settlement upon the trusts therein declared.

This issue was tried before Lord Coleridge, C.J., on the 15th of February, 1882, when his Lordship directed the jury that by law the jewels and other articles were the property of the husband, who was the plaintiff in the interpleader issue, and the jury accordingly found a verdict for him.

Madame Mercier, the defendant in the issue, obtained a rule nisi for a new trial, and the rule was argued before a Divisional Court consisting of Mathew and Cave, JJ., on the 4th of April, 1882, but the Court being equally divided in opinion, the rule was discharged.

The defendant appealed.

The original settlement which was not produced at the trial, nor before the Divisional Court, was produced to the Court of Appeal.

Tomlinson (*Garth*, with him), for the defendant. The case was argued both at the trial and on the rule for a new trial on the supposition that the settlement did not include the jewels. But now that the settlement is produced it is clear that the true construction of the settlement is that the jewels are excepted from the property which is to go to the trustees, and are to belong to the lady for her separate use.

A. Cock (*Sir H. Giffard*, *Q.C.*, with him), for the plaintiff, Mr. Williams. Admitting that the jewels belong to Mrs. Williams for her separate use, the husband takes them as trustee for her,

and at law they are his property. Therefore the issue was correctly found for the plaintiff. The sheriff cannot seize goods in which the wife has only an equitable interest. The original action was irregular in not making the husband a party defendant.

If the issue was wrongly decided the Court cannot on this appeal give judgment for the defendant, but there must be a new trial. Order XL., rule 10, does not apply to proceedings in interpleader, because by Order I., rule 2, the old procedure and practice in interpleader are still preserved.

JESSEL, M.R. When the settlement is looked into it is quite plain that the jewels are the wife's separate property. They were her property before the marriage, they became her husband's property on the marriage, and then the settlement made them the separate property of the wife. Then s. 12 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), provides, "A husband shall not be liable for the debts of his wife contracted before marriage [this first provision is repealed by 37 & 38 Vict. c. 50, s. 1]—but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried." That is, execution can issue against her as if she were sole or unmarried. It is therefore plain, that the husband need not be joined with her in the action.

With respect to the order that we ought now to make, it is quite clear that Order XL., rule 10, applies to every application for a new trial; there is no exception of interpleader proceedings. It is true that by Order I., rule 2, the old practice of interpleader is continued, but there are no negative words in Order XL., rule 10, to exclude the new powers of the Court of Appeal in carrying out that practice. The Court must declare that the property which was seized was the separate property of the wife, and must enter the judgment for the execution creditor, who must have the costs both in the Court of Appeal and in the Divisional Court.

LINDLEY, L.J. It is strange that the view which the Court takes of the construction of the settlement has never been taken

1882

WILLIAMS v. MERCIER.

before: but I think it is open to no other construction. It is true that the old practice of interpleader is to be pursued, but in a case where there is really nothing new to be tried the Court of Appeal does not exceed its powers in directing the verdict to be entered without directing a new trial. The verdict will therefore be entered for the execution creditor.

Appeal allowed.

Solicitors for plaintiff: *Pawle & Fearon.*
Solicitors for defendant: *Lewis & Lewis.*

M. W.

June 14.

[IN THE COURT OF APPEAL.]

SMITH *v.* KEAL.

Sheriff—Liability of Execution Creditor for wrongful Seizure under fi. fa.—Implied Authority of Solicitor—Direction to levy on particular Goods.

Whether a seizure of particular goods under a fi. fa. was directed by the execution creditor, so as to make him liable for the act of the sheriff, is a question of fact.

It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa. to direct the sheriff to seize particular goods.

Jarmain v. *Hooper* (6 Man. & G. 827) distinguished.

ACTION of trespass tried before Pollock, B., and a jury at the Liverpool summer assizes.

The facts appearing on the trial were that the defendant, having recovered judgment in an action against one Worth Law, who had at one time been in partnership with the plaintiff, issued execution. After delivery of the writ of fi. fa. to the sheriff, his officer, doubting as to the goods available for seizure under it, wrote to the defendant's solicitors asking for an interview, and their managing clerk accordingly had an interview with the sheriff's officer, and had some conversation about goods at a brewery, which was the address indorsed on the writ. To the officer's request for information the clerk answered that he thought that Worth Law had a share in the brewery, and that the sheriff had better seize there. After this conversation, the officer seized at the brewery some goods belonging to the present plaintiff. The

plaintiff claimed the goods as his exclusive property, whereupon the sheriff interpleaded; an interpleader issue to try the question whether the goods were the property of the plaintiff as against the defendant was ordered and tried. It was decided in favour of the plaintiff, who then brought the present action against the defendant for the wrongful seizure of his goods by the sheriff.

The learned judge directed a nonsuit to be entered.

A rule having been granted calling on the defendant to shew cause why the nonsuit should not be set aside, and for a new trial on the ground of misdirection,

Jordan, shewed cause. The nonsuit was right. The execution creditor not having directed the seizure, is not liable for it: *Woollen* v. *Wright* (1); and even subsequent ratification would not make him responsible for the act of the sheriff: *Wilson* v. *Tumman*. (2) Nothing less than personal interference will make the execution creditor liable in trespass: *Childers* v. *Wooler* (3); *Cronshaw* v. *Chapman*. (4) *Humphrys* v. *Pratt* (5) is distinguished in *Collins* v. *Evans*. (6) The solicitor's clerk had no authority from the defendant to direct the sheriff.

Addison, Q.C., in support of the rule. The sheriff, having received the writ, abstained from executing it until he had directions. Those directions were given by the managing clerk of the solicitor to the execution creditor. Such interference renders him liable. In *Mortinson* v. *Cohen* (7), an execution creditor, who had written directions to the sheriff, was held liable in the Court of Appeal, which reversed the decision of the Queen's Bench Division, and the Court of Appeal thought *Cronshaw* v. *Chapman* (4) wrong. The solicitors in the action had authority to direct the sheriff to seize, just as a solicitor would have authority to order him to withdraw from possession: *Levi* v. *Abbott* (8); and the act of the clerk is the act of the solicitor, for whose act the execution creditor is liable: *Jarmain* v. *Hooper*. (9) There

(1) 1 H. & C. 554.
(2) 6 Man. & G. 236.
(3) 2 E. & E. 287.
(4) 7 H. & N. 911; 31 L. J. (Ex.) 277.
(5) 5 Bli. (N.S.) 154.
(6) 5 Q. B. 820.
(7) Unreported.
(8) 4 Ex. 590.
(9) 6 Man. & G. 827.

1882

SMITH v. KEAL.

may be personal interference through an agent. It is the solicitor's duty to do his best to procure the realisation of the judgment.

Secondly. There was evidence of an authority to seize these goods. The indorsement on the writ might not be enough, nor mere casual conversation between the clerk and the sheriff's officer, but here there was evidence of a direction to levy at the brewery.

Jordan, in reply. *Mortinson* v. *Cohen* (1) turned on the construction of a particular letter, and does not govern other cases. In *Jarmain* v. *Hooper* (2) the attorney was clearly acting within the scope of his authority.

Cur. adv. vult.

March 28. MANISTY, J. (after stating the facts), said:—The first question is whether there was evidence to go to the jury that the defendant had directed the sheriff to seize the goods at the brewery. That is a question of fact, and the only evidence of any such direction is what passed between the sheriff's officer and the defendant's solicitor's managing clerk. I am of opinion that what so passed did not amount to such a direction, but only to an expression of opinion on the part of the managing clerk as to the goods available for seizure. I think the sheriff's officer understood it in the latter sense, and that he seized the goods at the brewery on his own responsibility intending to interplead if the plaintiff claimed the goods. If the sheriff seized the goods on the responsibility of the defendant he would not have been entitled to avail himself of the protection of the Interpleader Act: *Tucker* v. *Morris* (3), *Dudden* v. *Long*. (4) The authorities show that to render the execution creditor liable for the act of the sheriff clear evidence must be given that the seizure was made by his direction or that of his agent duly authorised in that behalf. I do not think that there was any evidence here from which the jury could reasonably find that the sheriff seized these goods by direction of the defendant or his agent. Difficult questions no doubt sometimes arose as to the effect of what had passed between the solicitor of the execution creditor or his agent and the sheriff's

(1) Unreported.
(2) 6 Man. & G. 827.
(3) 1 Cr. & M. 73.
(4) 1 Bing. N. C. 299.

officer. I do not propose to go through the decisions on this point. One of the most important is *Childers* v. *Wooler*. (1) That was an action brought by the sheriff against the solicitor of the execution creditor, whom the sheriff sought to render responsible on the ground that he had directed the sheriff to seize certain goods. The case turned on the indorsement upon the writ, which stated that the execution debtor resided at a certain place, whereas it was his son who resided there, and the debtor really resided at another place, and in consequence of such indorsement the sheriff seized the goods of the son. The judges differed in opinion as to whether the indorsement amounted to a direction to seize the goods of the son. Wightman, J., held that it did, but the majority of the Court were of the contrary opinion. That case seems to have a considerable bearing on the question I am discussing, and to be if anything a stronger case than the present. So much for the question whether there was evidence of a direction to seize, which I have up to this time assumed to have been within the scope of the authority of the solicitors, and for which the defendant was responsible.

The second question involved is one of great and general importance. It is whether the solicitor for the execution creditor has implied authority to direct the sheriff to seize particular goods in pursuance of a writ of execution. I have looked for any direct authority on this point in vain. The decisions in the cases of *Jarmain* v. *Hooper* (2) and *Levi* v. *Abbott* (3) are on somewhat analogous points, but these cases are by no means decisive of the present. The result of them may be briefly stated. In *Jarmain* v. *Hooper* (2) it was held that it was within the scope of the solicitor's authority to issue and endorse the writ, and therefore that when the solicitor was negligent and endorsed the writ incorrectly the execution creditor was liable. There can be no doubt that that decision was correct, but it is not conclusive of the present case. *Levi* v. *Abbott* (3) was an action against the sheriff for withdrawing an execution, and it was held that it was within the scope of the solicitor's authority to direct the sheriff to withdraw. Again there can be no doubt that this case was rightly decided, but it

(1) 2 E. & E. 287. (2) 6 Man. & G. 827, p. 850.

(3) 4 Ex. 588.

1882

SMITH v. KEAL.

Manisty, J.

does not touch the present point. The case that seems to me nearer than any other to the present is *Collett* v. *Foster*. (1) In that case the attorney for the execution creditor had signed judgment and issued a writ of ca. sa., but it turned out that less than 20*l*. was due on the judgment and the execution was set aside. An action for trespass against the execution creditor was brought, and he was held to be liable because there was some evidence of direct interference by him in the matter. Bramwell, B., concurred in the judgment with some misgiving. He says: "The client may be liable if the attorney act inadvertently or ignorantly. If a fi. fa. is set aside as being merely irregular the client is doubtless liable. But can this defendant be made liable for an act which she cannot be supposed to have authorized her attorney to do? I have a great desire in all cases to make the actual wrongdoer alone responsible and to limit the doctrine of respondeat superior."

I entirely concur in this expression of the desire to confine the liability to the actual wrongdoer. As a matter of principle I should say that a solicitor has no right without express authority to impose on his client a responsibility that the law casts on the sheriff. It is no doubt the duty of the solicitor to inform the sheriff who the execution debtor is, but when he has performed that duty, the responsibility rests on the sheriff of levying according to the writ. In the absence of authority to that effect I decline to hold that it is within the scope of the solicitor's general authority to impose upon his client the responsibility which the law has cast upon the sheriff. On these grounds I come to the conclusion that the non-suit was right and that the rule should be discharged with costs.

STEPHEN, J. I agree in the conclusion at which my Brother Manisty has arrived, but I have the misfortune to differ from him to a certain extent in my reasons for that conclusion. I need not repeat the facts of the case. It seems to me that there are two points involved: First, whether the client is in this case liable for the act of his solicitor; secondly, whether the solicitor or the solicitor's clerk, for I think there is no distinction between them for this purpose, did in point of fact direct the sheriff to

(1) 2 H. & N. 356.

take these goods. I think that the defendant is liable for the act of his solicitor in directing the sheriff to take particular goods, and the cases of *Jarmain* v. *Hooper* (1), *Levi* v. *Abbott* (2), and *Collett* v. *Foster* (3), which have been referred to, seem to me authorities for that proposition. Neither of these decisions is directly in point. Each of them must no doubt, as is the case with all decisions, be read in connection with the particular facts of the case, but we must look at the general principles laid down by the judges; and the language in these cases does seem to me to lay down the rule as to the responsibility of the client for the acts of his solicitor in terms sufficiently wide to cover this case. I do not feel satisfied that there was anything in the particular circumstances of these cases to warrant us in limiting the generality of the expressions used. The question is whether it was within the scope of the duty of the solicitor to point out to the sheriff the goods which he was to seize under the writ of execution. It seems to me that when a man puts his cause into the hands of a solicitor he authorizes the solicitor generally to act for him in the conduct of the cause, and take all the necessary steps incidental thereto. The solicitor seems to me to be just one of those agents for whom the employer ought to be liable when he makes a mistake in the performance of any of the acts incidental to his duty. In the case of *Jarmain* v. *Hooper* (1) the language used by the Court is of the most general character. Tindal, C.J., says, "The attorney has the general conduct of the cause; he is the only person with whom the sheriff has communication, and in taking a step essentially necessary for the benefit of the client, that is, for obtaining the fruit of his judgment, we think he cannot be held to have acted beyond his authority, though he has miscarried in its execution." In the case of *Levi* v. *Abbott* (2) similar expressions were used by Alderson, B. It seems to me that the pointing out to the sheriff of particular goods to be seized in execution does come within the scope of the authority given by the client to the solicitor. An illustration that occurs to me is this. Suppose the solicitor had reason to believe, and did believe,

(1) 6 Man. & G. 827. (2) 4 Ex. 588.
(3) 2 H. & N. 356.

1882

SMITH v. KEAL.

Stephen, J.

that there were certain goods, the property of the execution debtor, available for the purposes of the execution, and the goods in question did belong to the execution debtor, but the solicitor from fear of incurring any responsibility abstained from pointing out these goods to the sheriff, and thereby the debt was unsatisfied; I am not sure that the solicitor might not be liable to his client for negligence. In *Collett* v. *Foster* (1), no doubt Bramwell, B., felt a difficulty as to the client's responsibility, but the decision of the majority of the Court was clearly in favour of his being responsible. Chief Baron Pollock said, "I think there is a great distinction between employing an attorney who represents the parties in a suit and employing a contractor to do work such as building a house. In the latter case the employer is not liable for the acts of the contractor; the contractor is responsible and the employer is not, but it certainly has always been held, and I am not aware that in any text-book or in any case there will be found a single exception to the rule, that a person is liable for the acts of his attorney in the conduct of a suit at law brought under his authority. He gives to the attorney the right to represent him, and he is responsible for whatever the attorney does. Such is the law, and we are not competent to change it." And Martin, B., referred to a case of *Barker* v. *Braham* (2) as having settled the point. It seems to me that the manner in which the rule is laid down by the cases to which I have referred with regard to the responsibility of the client prevent me from coinciding with my Brother Manisty on this point.

But on the question whether the sheriff was in fact directed to take the goods, I think that he was not. I think that the parties must be taken to have known the law, and that they probably acted on it, and that it was the sheriff's duty to find out to whom the goods belonged. Unless there is clear proof of a direction to seize the goods the client would not be responsible. The words used by the managing clerk might under special circumstances have amounted to such a direction, but there was no evidence of any such circumstances; and I think that upon the whole of the

(1) 2 H. & N. 356. (2) 2 Wm. Black. 866.

facts before us we ought to take the words in their natural sense, and in their natural sense they do not seem to me to amount to such a direction. For these reasons I think that the rule should be discharged.

POLLOCK, B. I agree in the main with the judgment of my Brother Manisty, but I wish to add a few words. The words used by the solicitor's clerk with reference to the property to be seized being in my opinion ambiguous, and it being open to doubt whether they amounted to a direction to seize the goods or only to an expression of opinion or information by the solicitor's clerk, if the case had rested on the construction of those words I should have thought it right that the question what they meant should be submitted to the jury. But I have a very clear opinion on the question of law involved, and I think that I ought therefore to decide the case in accordance with that opinion. There being no express authority given by the defendant in the present action to the sheriff to seize these goods, the only ground on which it can be said that he is liable is that what was done by the managing clerk of the solicitor of the defendant was done in pursuance of his implied authority, and I am of opinion that there is no legal ground for the implication of such authority. As a matter of general principle I agree with the view taken by Bramwell, B., in *Collett* v. *Foster* (1), viz., that we should be very cautious how far we extend the doctrine of an implied authority given to agents. There are many cases in which it is essential that there should be such an authority. There are cases in which a person is put in the place of another to do an act or a series of acts, such as the case where a railway official necessarily is put in the place of the company and represents it with regard to the general conduct of some branch of its business. But so far as regards the authority of a solicitor or attorney, all the cases in the books in which the client has been held liable for the acts of the attorney are, so far as I can find, cases of acts done by the attorney the doing of which was necessarily incidental to his duty as attorney. The acts done were like steps in the cause which were necessarily taken for the client by the attorney. That was so in the case

(1) 2 H. & N. 356.

1882

SMITH v. KEAL.

Pollock, B.

of *Parsons* v. *Lloyd* (1), where trespass was held maintainable against the client for the act of his attorney in causing the plaintiff to be arrested under a writ which was afterwards set aside for irregularity. The suing out of the writ being an act which was necessarily done by the attorney in the course of his employment, it was clear that the client was responsible in that case for the ignorance or unskilfulness of the attorney whom he selected to represent him. So also in the case of *Jarmain* v. *Hooper* (2): in that case the defendant, or some one on his behalf, must have seen to the issuing of the writ, and the defendant's attorney having made a mistake the defendant was held responsible: so also in *Barker* v. *Braham.* (3) The same reasoning applies to the cases of *Levi* v. *Abbott* (4), and *Collett* v. *Foster.* (5) In all of these cases there are no doubt some dicta which if read generally, and as applicable to all cases, might be said to govern this case. But I do not think they are applicable. Two considerations occur to me as illustrating the question involved. Suppose the managing clerk of the solicitor had done what it seems to me it would be most prudent to do, and had said to the sheriff, "It is your business and not mine to ascertain what goods are available for seizure under the execution, and I shall not advise you upon the matter at all," and at that very moment the clerk had certain information that there were goods that might be seized belonging to the execution debtor, would an action lie at the suit of the client against the solicitor for negligence in not giving information to the sheriff of these goods? I should say clearly not. I never heard of such an action, and I should say that to hold such an action maintainable would be very dangerous, as tending to promote the intermeddling of the solicitor with a function that the law casts on the sheriff. Again, suppose the sheriff's officer in the present case had asked the managing clerk before he could seize the goods for an indemnity in the name of the client, and the clerk had given one. It seems to me that such an indemnity would have been worthless. These considerations seem to me illustrations of the general principle which

(1) 3 Wils. 341.
(2) 6 Man. & G. 827.
(3) 2 Wm. Black. 866.
(4) 4 Ex. 588.
(5) 2 H. & N. 356.

I take to be that where the solicitor is doing an act which is an essential part of his duty in the conduct of the cause the client is liable in respect of such act, but when the act done is not necessary to the performance of his duty the client is not liable. I do not think it necessary to discuss at length the various dicta that have been referred to. No doubt if applicable to this case they would sustain the plaintiff's contention, but I do not think they are applicable. It seems to me that on principle the case is clear. Questions of this kind must have often arisen, but I can find no case in which under the circumstances of the present case an action has been maintained against the client for the act of his solicitor. For these reasons I think the rule should be disharged.

Rule discharged..

J. R.

From this decision the plaintiff appealed.

May 26. *Addison, Q.C.*, for the appellant, relied on *Jarmain* v. *Hooper* (1); *Levi* v. *Abbott.* (2)

Jordan and *Danckwerts*, for the defendant, cited *Childers* v. *Wooler* (3); *Wilson* v. *Tumman* (4); *Cronshaw* v. *Chapman* (5); *Collins* v. *Evans.* (6)

June 14. JESSEL, M.R. This was an appeal from a decision of three judges of the Queen's Bench Division, who agreed in discharging the rule for a new trial, although they did not agree in their reasons for so doing. A question had arisen whether one Worth Law was a partner of the plaintiff Smith. He had at one time been a partner, but the partnership had been dissolved, and after the dissolution of the partnership an execution was issued in an action brought by Keal against Law. The sheriff seized the goods at the place of business; Smith claimed the goods as his own, the sheriff interpleaded, and on the interpleader issue it was decided that the goods were not the goods of Law but of Smith. The sheriff being protected by the interpleader proceedings,

(1) 6 M. & G. 827.
(2) 4 Ex. 588.
(3) 2 E. & E. 287.
(4) 6 M. & G. 236.
(5) 7 H. & N. 911; 31 L. J. (Ex.) 277.
(6) 5 Q. B. 820.

1882

SMITH v. KEAL.

Jessel, M.R.

Smith has brought this action against the execution creditor for the trespass; and the question we have now to decide is whether on the evidence which has been adduced the action will lie. It appears that the sheriff's officer had some doubts whether the goods at the place of business were the goods of Law and Smith, and wrote to Keal's solicitors to ask for an interview. The sheriff's officer did not see the solicitors, but he saw their managing clerk, with whom he had a conversation. The sheriff's officer told him of some prior proceedings in another action in which Smith and Law had made an admission that the goods at the place of business were the property of Smith and Law. This being communicated to the clerk he said that he thought they were in a position to prove that Law had a share in the brewery, and that the officer had better seize there. The first question was, whether this amounted to a direction by Keal's solicitor to the sheriff to seize the goods at the brewery. On one side it was contended that it was a direction, and that the sheriff acted on that direction; on the other side it was said that it only amounted to advice, and the sheriff acted on his own authority. The judge who tried the action did not leave the question to the jury but directed a nonsuit, being of opinion that if what was said by the clerk did amount to a direction to the sheriff, it was beyond the scope of the solicitor's authority to give such direction. Therefore there are two questions for our consideration. First, was there sufficient evidence to go to the jury on the question whether what the clerk said amounted to a direction to the sheriff to seize the goods, or was the evidence so slight that no rational being would be influenced by it? Secondly, assuming that there was a direction to the sheriff on the part of the solicitor, would his client be answerable for it? Now as to the first point, I think there was sufficient evidence to go to the jury. This clearly depends upon the mode in which the words were spoken; it does not follow that the words, "you had better seize the goods," were intended to mean "you must seize them," but they might have meant that. It seems to me that if there had been no question of law behind, the meaning and effect of the words used ought to have been left to the jury; and I am glad to see that Pollock, B., who tried the case appears to have been of the same opinion, and

that he would have left that question to the jury if it had not been for the point of law.

We must now, therefore, consider the point of law. In the first place it is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. I agree that the Court ought to be very careful how it extends the doctrine "respondeat superior." It has been carried in our law very far indeed. I think quite far enough. If I had to enact a law upon the subject, I doubt whether I should carry it so far. What we have to find out is what is the extent of the authority of a solicitor who is employed by a plaintiff in an action. Now it is clear that it is no part of his duty to interfere with the sheriff in the performance of his duty. It is the sheriff's duty to levy execution on the goods of the judgment debtor. If therefore the solicitor interferes, and directs the sheriff to levy on the goods of another person, he is answerable on the same principle as any one else who directs a trespass. Though the sheriff is an officer of the law he is liable if he commits a trespass, and any one who joins in the trespass is equally liable. But why should it be assumed that it is within the scope of the solicitor's duty to give verbal directions to the sheriff as to the proper execution of his writ? It is not the province of the solicitor to interfere with the sheriff. The sheriff must ascertain himself whether the goods he seizes are the judgment debtor's goods.

Is there then any case which decides that it is within the ordinary duty of a solicitor to give directions to the sheriff as to the ownership of the particular goods he is about to seize? I am aware of no such case. Two of the learned judges in the Court below said that they had searched and had not been able to find any, and none have been cited before us in argument. There is, however, the case which has been referred to, decided by the full Court of Common Pleas in 1843, *Jarmain* v. *Hooper*. (1) That case is not technically binding on the Court of Appeal, but whether rightly or wrongly decided, it was decided nearly forty years ago, and has never been questioned since. It has been frequently

(1) 6 Man. & G. 827.

1882

SMITH v. KEAL.

Jessel, M.R.

cited and commented on, and has got into the text-books, and the Court of Appeal ought not now to disturb it. There are two classes of cases, which must be distinguished. Where an old case is contrary to the principles of the general law the Court of Appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it. In the present instance the decided case made the law as to the scope of a solicitor's authority. No one could tell à priori how far a solicitor's authority in an action would extend. It depends very much upon the custom of the profession what is within, or what is not within, a solicitor's authority. Therefore, when we have a case deciding that a particular thing is within the scope of a solicitor's authority, which had not been so considered before, that makes it within the scope of his authority, and unless questioned at the time, it ought not to be afterwards interfered with.

That being so, we must consider what it was that was held in that case to be within the scope of the solicitor's authority. The solicitor had indorsed on the writ something which the Court held to be a direction to the sheriff to seize the goods of somebody who was not the execution debtor. It was in this form. "The defendant is an upholsterer and bill broker, and resides at No. 3, Prospect Place," &c. The person named Joseph Jarmain residing there was not the judgment debtor, and the sheriff was misled by this direction, and seized the goods of the wrong person. The question in the case was whether the execution creditor was bound by this direction by his solicitor, and the Court held that he was bound.

The judges say (1): "It appears to us that the direction given by the attorney is a direction given by an agent within the scope of his authority and binds the principal. The attorney has the general conduct of the cause; he is the only person with whom the sheriff has communication; and in taking a step essentially necessary for the benefit of his client, that is for obtaining the fruit of his judgment, we think he cannot be held to have

(1) 6 Man. & G. at p. 849.

acted beyond his authority, though he has miscarried in its execution."

It was the duty of the solicitor to indorse the writ, but the judges do not say that if he had given a subsequent direction by parol, it would have been within the scope of his authority. It was his duty to fill up the indorsement of the writ, because he was taking a step essential to the benefit of his client in obtaining the fruits of his judgment. Therefore, if he miscarried, he could not be taken to have acted beyond the scope of his authority, and the client was bound by his act. But we should be doing wrong in extending the scope of the solicitor's authority to giving verbal directions to the sheriff, either himself or by his clerk.

Mr. Addison urged the general convenience of making the client liable in such a case. But I am not satisfied that it would be for the general convenience. The rule appears to me hard enough on the client to make him liable for all the mistakes which his solicitor may make within the scope of his authority, without making him liable for acts beyond the solicitor's duty. A person whose goods are wrongly seized by direction of the solicitor has a remedy against the sheriff, though, of course, that may be barred in the discretion of the Court, and also against the solicitor, and I think that is a sufficient indemnity, without making the execution creditor himself liable. The decision of the Divisional Court was right, and the appeal must be dismissed with costs.

LINDLEY, L.J. I am of the same opinion. If no question of law had been behind, I should have thought there was evidence of a direction to the sheriff, and that it would have been the duty of the judge to take the opinion of the jury upon the question, and I think he would have done so if he had not taken the view which he did upon the question of law.

Then as to the question of law. It is this: is the defendant liable for the act of the sheriff if done under the direction of his solicitor? Assuming that the solicitor by his clerk told the sheriff to seize the goods in the wrong place, is the execution creditor responsible for the wrongful act? It is the duty of a solicitor to conduct the action in the ordinary way, and if his client obtains judgment it is his duty to do such acts as may be necessary to

1882

SMITH v. KEAL.

Lindley, L.J.

obtain the fruits of the judgment. If a fi. fa. is necessary he must issue it, and make the proper indorsement on the writ; and if he makes a mistake in so doing his client is responsible. That is the decision in *Jarmain* v. *Hooper*. (1) I have often had occasion to consider that case, and I do not think it has been shaken by any subsequent decision. Whatever objections to it may have been felt by some judges, it has been taken as good law, and has been constantly acted upon. But we are now asked to extend the doctrine there laid down beyond what has been done by any other case. We are asked to hold that the execution creditor is liable for the wrongful act of the sheriff in consequence of some verbal advice or direction given by his solicitor's clerk to the sheriff's officers. It is not within a solicitor's authority to tell the sheriff how to perform his duty. It is the sheriff's business to find out what goods to seize, and if he seizes the goods of the wrong person such person has his remedy against the sheriff; but upon what principle can the innocent execution creditor be made liable? His solicitor is not his agent for the purpose of giving verbal directions to the sheriff as distinguished from directions on the writ itself. I therefore agree that this appeal must be dismissed with costs.

BOWEN, L.J., not having heard the whole argument, took no part in the judgment.

Appeal dismissed.

Solicitors for plaintiff: *Nash, Chester, Mayhew, & Co., for R. G. Lawson, Manchester.*

Solicitors for defendant: *Hare & Co., for Heywood & Sons, Manchester.*

(1) 6 Man. & G. 827.

M. W.

CLARK & SON *v.* CULLEN AND ANOTHER. 1882

June 22.

Practice—Judgment against Firm—Partners—Action on Judgment—Execution—Order XLII. r. 8.

Where judgment has been recovered against a partnership firm in the name of the firm, the plaintiff may bring an action on the judgment against the individual members of the firm, and is not confined to the remedy given by Order XLII. r. 8, with respect to the issue of execution.

DEMURRER to a statement of claim.

The statement of claim alleged that the plaintiffs supplied goods to a firm of "Shand & Co.," and on the 20th March, 1882, recovered judgment against "Shand & Co." for 269*l.*, the price of the goods, which judgment remained wholly due and unsatisfied; that the defendants in the present action were partners in the firm of "Shand & Co." under an agreement dated the 31st of August, 1880, and that on the 20th of September, 1881, the whole of the stock and effects of the business of "Shand & Co." were sold by auction under the direction of the defendants, who received the proceeds of such sale, and there were then no assets of the firm of "Shand & Co." to answer the judgment.

The plaintiffs claimed (1) a declaration that the defendants were jointly and severally liable for the debts of Shand & Co.; (2) that the defendants might be ordered jointly and severally to pay to the plaintiffs the amount of the judgment with interest.

The defendants demurred to the whole statement of claim on the grounds that the judgment sued on was not a judgment against the defendants, and that the remedy of the plaintiffs (if any) was under Order XLII. r. 8.

Issue was joined on the demurrer.

Shortt, for the defendants, in support of the demurrer. By Order XLII. r. 8, a special mode is provided of proceeding where a party who has obtained judgment against a firm claims to be entitled to issue execution against any other person as being a member of the firm, and no other mode can be resorted to: *Jackson* v. *Litchfield* (1); judgment of Brett, L.J. (2)

(1) 8 Q. B. D. 474. (2) 8 Q. B. D. at p. 478.

1882

CLARK v. CULLEN.

[MATHEW, J. The Lord Justice's remarks are only with respect to issuing execution.]

The intention of the legislature is to compel the plaintiff to obtain the special leave of the Court, and a direction (if necessary) as to the manner in which the issue of liability should be tried, before proceeding upon his judgment against members of the firm.

Gore, for the plaintiffs, was not heard.

POLLOCK, B. I should be sorry not to give full effect to a useful rule of procedure, but I can see no good ground for deciding that a plaintiff, who has recovered judgment against a firm, is confined to the remedy given by r. 8 of Order XLII. I am of opinion that the plaintiff may still do that which, before the Judicature Acts, he could do in the Court of Chancery without any special leave of the Court. There is no authority to support the contention for the defendants. In *Jackson* v. *Litchfield* (1) the plaintiff, having issued his writ against a partnership firm in the name of the firm, moved to enter judgment against a person whom he had discovered to be a member of the firm, and who had not appeared to the writ. Upon that Lord Justice Brett said that the only mode of putting the judgment into execution was by proceeding under r. 8. In that case James Litchfield was admittedly a member of the firm, but in the present case there is no such admission by the defendants, who are entitled to defend the action on the judgment on the ground that they are not members. I am of opinion, therefore, that the observations of Lord Justice Brett have no application in this case, and that there should be judgment for the plaintiffs on the demurrer.

MATHEW, J. I am of the same opinion.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Harper & Battcock.*
Solicitors for defendants: *Carr, Fulton, & Carr.*

(1) 8 Q. B. D. 474.

W. A.

GRIFFITHS *v.* THE EARL OF DUDLEY.

1882
June 16.

Master and Servant—Negligence—Common Employment—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1—*Contract by Workman not to recover Compensation under the Act, whether Valid—Contract against Public Policy—Injury resulting in Death—Lord Campbell's Act* (9 & 10 *Vict. c.* 93)—*Widow of Workman, whether bound by his Contract not to claim Compensation.*

It is competent to a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880.

By s. 1 of the Employers' Liability Act, 1880, where personal injury is caused to a workman in certain specified cases, the workman, or, in case the injury results in death, his legal personal representatives and any person entitled in case of death "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

A workman having contracted with his employer for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the Act for personal injury whether resulting in death or not:—

Held, that s. 1 only affected the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, and therefore did not render the workman's express contract not to claim compensation invalid.

Held, also, that the contract was not against public policy, and that the workman's widow, suing for damages under Lord Campbell's Act, was bound by it.

Action in the Dudley County Court, brought under the Employers' Liability Act, 1880, to recover a sum of 150*l.* as compensation for the death of H. Griffiths. The plaintiff sued as widow of H. Griffiths.

The material facts appearing on the judge's notes were as follows:—

H. Griffiths, a workman in the employment of the defendant at one of his collieries, was killed through falling from a "bowk," in which he was being drawn up the pit shaft. It was admitted that the accident happened by reason of a defect in the condition of an indicator used for the purpose of telling the driver of the winding engine when the "bowk" had reached the top of the pit, and it was also admitted that the defect arose from, and was not discovered or remedied owing to, the negligence of an inspector of machinery also in the defendant's employment, and entrusted

1882

GRIFFITHS v. THE EARL OF DUDLEY.

by the defendant with the duty of seeing that the machinery and plant were in proper condition.

At the time of the passing of the Employers' Liability Act there existed at all the defendant's collieries a benefit society or club called the "field box." A fund was raised by levying weekly contributions from the workmen, which contributions were deducted from their wages, and the defendant himself contributed to the "field box" a gross sum equal to the amount of the total contributions from the workmen. One of the benefits derived from the "field box" by the workmen was an allowance to the widow and family in the case of a workman being killed in the course of his employment. The payments made out of the fund were voluntary payments at the discretion of the defendant's agents who managed the "field box." On the 1st of January, 1880, the day upon which the Employers' Liability Act came into force, the defendant caused to be circulated throughout his collieries a printed document headed "conditions of employment," which contained stipulations that the persons employed at the colliery must be, and continue to be, during such employment ordinary members of the colliery club or Permanent Relief Society under its then present or any future name; that the employer should be, and continue to be, an honorary member of the society, and should subscribe thereto not less than theretofore; that, in consideration of such payment by the employer, and of being employed at the colliery, and as part of the terms of employment, every person so employed undertook for himself and his representatives, and any person entitled in case of his death, to look to the funds of the society alone under the rules and constitution thereof for compensation in case of injury sustained in such employment, whether resulting in death or not; and that neither the employer, nor any other person in his employment, whether a fellow servant or not, should be liable in respect of any defect, negligence, act, or omission under the Employers' Liability Act, 1880, or otherwise, or in respect of any negligence occasioning such injury; that the contract should remain in force and operate as a contract between the workman and the owner for the time being of the colliery, so long as the workman continued to be employed at the colliery.

This document was posted in the workmen's hovels, and in various conspicuous places in and about the collieries. H. Griffiths read and commented on it, and continued to work as usual, and paid his weekly contribution to the "field box" up to the time of his death.

The only defence set up at the trial was founded upon the evidence relating to this contract, and Griffiths' adherence thereto.

The county court judge held that the deceased could not contract himself out of the provisions of the Employers' Liability Act, 1880, so as to bind his widow in case of death resulting from injuries received in his employment; that the contract was bad for want of mutuality and consideration; that it was void as being against public policy, and gave judgment for the plaintiff.

A rule nisi was obtained for the defendant calling on the plaintiff to shew cause why judgment should not be entered for the defendant, or a new trial be had, on the grounds of misdirection and error in law in the judge's ruling.

Jelf, Q.C. (*Kettle*, with him), shewed cause.

First, the deceased had no power to bind his widow by his contract not to claim compensation under the Employers' Liability Act, 1880. Lord Campbell's Act (9 & 10 Vict. c. 93) gives a separate and independent right to the widow and children of a person killed, which did not exist at common law. It is a right wholly separate from any right existing in the deceased's representatives to recover for injuries to his personal estate. The 27 & 28 Vict. c. 95, does no more than alter the machinery by which the right given by Lord Campbell's Act may be enforced, by providing that in certain events the persons beneficially interested may sue in place of the representatives of the estate. The Employers' Liability Act must therefore be construed with respect to two causes of action; 1, where a workman receives injuries and survives, and, 2, where the injury results in death. It is submitted that the decision in *Read* v. *Great Eastern Ry. Co.* (1) is inconsistent with the decisions in the later cases of *Bradshaw*

(1) Law Rep. 3 Q. B. 555.

1882

GRIFFITHS v. THE EARL OF DUDLEY.

v. *Lancashire and Yorkshire Ry. Co.* (1) and *Leggott* v. *Great Northern Ry. Co.* (2)

Secondly, the contract made by the deceased with the defendant was void as being against public policy. If it was competent to the deceased to contract that he would not himself take advantage of the benefits conferred by the Employers' Liability Act, it is against public policy that he should be able to deprive his widow and children of the benefits the legislature has conferred upon them.

Thirdly, upon the true construction of s. 1 of the Employers' Liability Act, 1880, it is not competent to a workman to contract himself out of the provisions of the Act. The language is express that in the five cases enumerated in the section the workman "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work." The Act therefore sweeps away the contract of service for the purpose of allowing the workman to claim compensation, and where, as in the present case, the contract not to claim compensation under the Act is inseparable from the contract of service, the whole contract is destroyed for that purpose. It may be conceded that a workman's contract that the master shall not be liable for negligence might be binding if made outside the character of servant, and therefore separable from the contract of service, as in the case of a servant employed by day only, and allowed to sleep on the employer's premises at night. Whether the legislature by the Employers' Liability Act, 1880, intended to strike at the doctrine of *Priestley* v. *Fowler* (3) or that of *Wilson* v. *Merry* (4) the natural sense of the language used in s. 1 is large enough to embrace all contracts of service. The words are express that the workman shall have the same rights as if no service existed. The object of the statute being to compel the employer to protect his workmen, it is a natural provision that the employer should be prohibited from bargaining with a workman against the operation of the Act, and the fact that Lord Campbell's Act may be resorted

(1) Law Rep. 10 C. P. 189.
(2) 1 Q. B. D. 599.
(3) 3 M. & W. 1.
(4) Law Rep. 1 H. L., Sc. 326.

to strengthens that view of the legislature's intention. Freedom of contract has been interfered with, for the protection of certain classes of persons, by various statutes, and the legislature must be taken to have interfered with it here for the protection of workmen and their families.

[The point that Griffiths' contract was void for want of mutuality and consideration was abandoned.]

R. T. Reid, supported the rule. If the third contention made for the plaintiff be well founded, it follows that by no contract could a workman bind himself not to claim compensation under the Employers' Liability Act, 1880. If he received increased wages for a length of time in order to cover the risk of being injured in his employment, he would still, when an injury happened to him, be entitled to recover damages under the Act in addition to the increase of wages he had already received. Where the legislature has thought fit to interfere with freedom of contract very strong and express words have been used, as in the Truck Act (1 & 2 Wm. 4, c. 37), the Ground Game Act, 1880 (43 & 44 Vict. c. 47), and the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49). It is strange if the Employers' Liability Act, 1880, has done by inference that for which in all other cases such strong and express words have been considered necessary. The argument for the plaintiff assumes that the person claiming compensation must be upon the employer's premises and injured there, but if the Act sweeps away the contract in the way suggested the person claiming compensation would have no right to be there; he would be a mere trespasser and not entitled to any compensation in the character of a workman under a contract of employment. The purpose of the Act is clear; when it was passed the law was that a person injured through the negligence of another, or of his servant, was entitled to damages unless the defence of common employment was set up; in that case the defendant was held to have impliedly contracted that the employer should not be liable. The Act only provides that in the five specified cases the workman or his representatives shall have the same right of action as if he had not been a workman, i.e., as if there was no such implied contract. No sufficient reason can be suggested for

1882

GRIFFITHS v. THE EARL OF DUDLEY.

importing into the Act a restriction on freedom of contract which is not imposed by express words.

[He was not required to argue the other points raised for the plaintiff.]

FIELD, J. This case is an important one, as it is of course very desirable that there should be no uncertainty with regard to the construction of the Employers' Liability Act. The plaintiff is suing, not as administratrix of her husband, but as his widow, to recover under Lord Campbell's Act pecuniary loss sustained by her through her husband's death. The Employers' Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the Act, clearly liable where he himself was guilty of negligence. It is also clear now that for the negligence of a fellow workman not coming within any of the classes of persons specified in the Act the employer is not liable. But before the passing of the Act *Wilson* v. *Merry* (1) had decided that where the injury was caused through the negligence of a superior person in the employment, the workman could recover no damages from their common employer. The object of the Act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes. If therefore the person injured in the present case had not made the contract which is relied on to exempt the defendant from liability, he would himself, during his lifetime, clearly have been entitled to recover. It is also clear that the terms of the contract do expressly stipulate that the workmen shall not look to the defendant for compensation for any injury received in the employment, and that the deceased accepted the employment and was willing to continue working on those terms. There is no suggestion that the contract was induced by fraud, or by force, or made under duress, and it was not a naked bargain made without consideration, for the defendant contributed an amount to the club equal to the whole amount of contributions from the workmen. I am unable

(1) Law Rep. 1 H. L., Sc. 326.

to concur in the view taken by the learned county court judge of these facts and of the statute. He held that the contract was against public policy. It is at least doubtful whether, where a contract is said to be void as against public policy, some public policy which affects all society is not meant. Here the interest of the employed only would be affected. It is said that the intention of the legislature to protect workmen against imprudent bargains will be frustrated if contracts like this one are allowed to stand. I should say that workmen as a rule were perfectly competent to make reasonable bargains for themselves. At all events, I think the present one is quite consistent with public policy. The county court judge also held that the deceased could not contract so as to bind his widow and bar her right to sue. It is urged that, although a man can bind the representatives of his estate by his contracts, the widow obtains a new and independent right by virtue of Lord Campbell's Act. There is no doubt that the subsequent Act, 27 & 28 Vict. c. 95, gives her a right to sue, independently of her character as her husband's representative. She is entitled to sue if the personal representatives do not sue within six months, but the statute only supplies a mode of procedure. The executors might take a different view from the widow and decline to bring an action, and in that case she is entitled to bring one, but she gains no new cause of action. *Read* v. *Great Eastern Ry. Co.* (1) is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived.

The last point raised for the plaintiff was one suggested by myself. But I think the Court would be construing the Employers' Liability Act too narrowly if the construction which I suggested as a possible one were placed upon s. 1. At the time of the passing of the Act the law stood thus: It was an implied term of the contract between employer and workman that the latter should not recover damages if he was injured by the negligence of a person in the common employment. Then the effect of s. 1 was to do away with that implied term. The workman is obliged

(1) Law Rep. 3 Q. B. 555.

1882

GRIFFITHS v. THE EARL OF DUDLEY.

to rely upon the contract of service; but for that contract he would have no right of action at all; he is only entitled to be upon the employer's premises by virtue of it. I think the Court should take a broad view of the construction of the Act, having regard to the intention of the legislature. I do not think the words of the Act go far enough to compel the construction that the express contract by the workman against the operation of the Act should not take effect. In all the cases referred to in argument, in which the legislature has intended to enact that a person shall not be allowed to contract himself out of an Act of Parliament, very express words have been used. As a general rule entire freedom of contract has been preserved; it has only been interfered with in order to obviate great public injustice. It is legitimate to see what would be the consequences if the construction contended for by the plaintiff's counsel prevailed, because, if injustice would result, it is unlikely the legislature intended that construction. I think great injustice would result, because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim full additional compensation when he was injured.

The strongest argument suggested in favour of the contention for the plaintiff is the desire of the legislature to protect workmen. Protection has been afforded them against late hours of work, unfenced machinery, the employment of children in manufactories, and in other instances. If it could be shewn in the present case that large classes of workmen would be deprived of the protection which the legislature intended to give them by a decision that they could contract themselves out of the provisions of the Employers' Liability Act, a strong argument against that construction would be afforded. But that cannot be shewn. I am of opinion, therefore, that this rule should be made absolute to enter judgment for the defendant.

CAVE, J. I am of the same opinion. The main question is whether or not a workman can contract himself or his representatives out of the benefits of the Employers' Liability Act. The plaintiff's husband did so contract himself; it is said that the contract was against public policy. No authority has been cited

in support of that proposition, and I can see no reason why such a contract should be against public policy. I should not hold it to be so, and thus interfere with freedom of contract, unless the case were clearly brought within the principle of the decisions as to the contracts which are against public policy. It was argued that, whether or not the deceased could have bargained away his own right to recover damages, he could not bargain away the right of his family under Lord Campbell's Act. That Act was passed because it was thought a hardship that, where a man sustained personal injuries, and died without having himself recovered compensation, leaving behind him persons in certain degrees of relationship, those persons should not be entitled to bring an action. *Read* v. *Great Eastern Ry. Co.* (1) has decided that the Act gives no new cause of action to the relations, but only a right in substitution for the right of action which the deceased would have had if he had survived. We are bound by that decision; and the cases cited by Mr. Jelf are not in conflict with it.

As to the last point, I agree that the language of s. 1 of the Employers' Liability Act has not been felicitously chosen. Taking the language in its apparently literal sense the plaintiff must be regarded as a stranger. If he is to be taken as not being a workman of, nor in the service of, the employer, nor engaged in his work, it follows that he is on the premises as a trespasser or bare licensee. He is not there under contract, nor in the performance of any work in which the employer and he are mutually interested, so that in the majority of cases no action could be maintained. But I think the real meaning of the legislature is this: as far back as the date of the decision in *Priestley* v. *Fowler* (2) the law was that the workman could not recover for injuries sustained by him through the negligence of a fellow servant. In *Priestley* v. *Fowler* (2) this rule was said to be founded upon an implied contract between master and workman, that the master should not be liable. The Courts of Common Law have always felt hesitation in holding that there could be any right of action otherwise than arising out of contract or tort. They therefore applied the doctrine of implied contract—the effect of which, so far as a man's legal liability was concerned,

(1) Law Rep. 3 Q. B. 555. (2) 3 M. & W. 1.

1882

GRIFFITHS v. THE EARL OF DUDLEY.

was much the same as if there had been an express contract. The doctrine was extended by *Wilson* v. *Merry* (1) to injuries caused to a workman by a foreman or person occupying a position of superintendence in the same employment. The Employers' Liability Act was passed to remove the difficulty arising from the decision in *Wilson* v. *Merry*. (1) The effect of it is that the workman may bring his action in five specified cases, and the employer shall not be able to say in answer that the plaintiff occupied the position of workman in his service, and must therefore be taken to have impliedly contracted not to hold the employer liable. In other words the legal result of the plaintiff being a workman shall not be that he has impliedly contracted to bear the risks of the employment.

Rule absolute to enter judgment for the defendant.

Solicitors for plaintiff: *Stokes & Robinson, for W. Waldron, Brierly Hill.*

Solicitors for defendant: *Benbow, Saltwell, & Tryon.*

W. A.

May 23.

[IN THE COURT OF APPEAL.]

ALLCOCK *v.* MOORHOUSE.

Landlord and Tenant—Assignment of Yearly Tenancy—Assignment of Reversion—Action by Assignee of Reversion against original Tenant—Privity—4 Ann c. 16, *s.* 9 [*Revised Ed. Statutes, vol. iii. p.* 128]—8 *& 9 Vict. c.* 106, *s.* 6 [*Revised Ed. Statutes, vol. ix. p.* 968].

S. made a parol demise of a tenement to M. from year to year at a rent. M. by deed assigned all his estate, interest, and term in the tenement to a third party, but S. refused to accept the third party as his tenant. Afterwards S. assigned his reversion to the plaintiffs, who never accepted the third party as their tenant, and brought an action against M. for rent in arrear:—

Held, affirming the judgment of the Queen's Bench Division, that as no estate remained in M. after his assignment of his yearly tenancy, the Statute 4 Ann c. 16, s. 9, did not apply; that there was no privity of estate or of contract between the plaintiffs and M., and therefore the action could not be maintained.

ACTION for rent.

At the trial before Pollock, B., at the Manchester Winter

(1) Law Rep. 1 H. L., Sc. 326.

Assizes, 1882, it appeared that for some years previous to December, 1878, the defendant J. Moorhouse had been tenant from year to year of certain houses in Camden Place, Manchester, under a parol demise from Cornelius Shier, at an annual rent amounting altogether to 150*l.*

By an indenture dated the 11th of December, 1878, in consideration of 3600*l.*, the defendant assigned the goodwill of his business of a manufacturer of mineral waters, with his stock-in-trade, "and all his tenant's interest in the said houses, and all his estate, right, interest, and term in the said premises," to S. Swan and W. Hadwen, their executors, administrators, and assigns.

Messrs. Swan and Hadwen accordingly entered into possession of the houses.

On the 15th of November, 1871, Shier conveyed all his estate in the houses to the plaintiffs, who were the trustees of the Manchester Temperance Permanent Building Society, by way of mortgage, to cover his subscriptions to the amount of 2300*l.*

On the 15th of December, 1879, this mortgage was vacated, and a fresh mortgage of the houses was executed by Shier to the plaintiffs to the same effect.

Shier never accepted Messrs. Swan and Hadwen as his tenants. They paid him the rent to Michaelmas, 1879, but the receipts were made out to J. Moorhouse. A question had arisen as to the liability of the tenant to restore the premises, which were dilapidated, and Shier wished to retain Moorhouse as his tenant as the more responsible person.

No rent was ever paid to the plaintiffs, nor was any attornment made to them.

On the 23rd of September, 1881, the plaintiffs commenced the present action against Moorhouse, claiming the arrears of rent since Michaelmas, 1879.

The learned judge nonsuited the plaintiffs.

A rule having been obtained calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial granted,

March 16. *Ambrose, Q.C.*, and *R. Henn Collins*, shewed cause. *Gully, Q.C.*, and *S. Hall*, supported the rule.

1882

ALLCOCK v. MOORHOUSE.

MATHEW, J. I am of opinion that this rule must be discharged. I regret to have to give way to a technical objection in this case, because it seems to me that if this action had been brought in the name of Shier the defendant would have been liable.

But, as against that consideration, it appears that the parties have gone down to trial under the impression that the question to be determined was whether Moorhouse ever had ceased to be tenant of the property. Having failed in establishing that, then the other attempt has been made to make Moorhouse liable by a different route. That attempt appears to me not to have succeeded. It is a parol contract, therefore the statute of Henry VIII. does not apply. That appears to me to be admitted.

Then it is said that the statute of Anne relieved the plaintiffs of all difficulty on that subject. It is said that Shier being the owner of this reversion, and Shier subsequently assigning his reversion to Allcock and others, who are the plaintiffs, thereupon without any attornment the plaintiffs became entitled to any right issuing out of the property. By the time that the plaintiffs claimed this rent Moorhouse had ceased to be a tenant of the property, and some persons who appear to have been his assignees had taken his place. I think the statute of Anne has no operation as regards Moorhouse. It would have an operation possibly as affects the assignees. Therefore the attempt to make out the defendant liable I regret to say must fail. I am of opinion that the nonsuit entered was right, and that it cannot be set aside.

CAVE, J. I am of the same opinion, and to my mind after the discussion which this case has undergone it is very clear. To sue for rent there must be one of two things, either privity of estate or privity of contract. In this case there certainly was no privity of estate, for the defendant had assigned all his interest in the property to the present tenants before the reversion was conveyed to the plaintiffs.

Now the statute of Anne I think has nothing at all to do with the case, for it seems to me, upon the language of it, quite clear that it only provides that where there is privity of estate no

attornment shall be necessary in order to vest the right of action.

Then is there privity of contract? Clearly not. The contract here was a parol contract with Shier, and parol contracts do not run with the reversion. So that there being neither privity of estate nor privity of contract it seems to me that the plaintiffs are not entitled to maintain this action against the present defendant.

As regards what might have been the case if Shier had been made plaintiff, I should rather prefer not to express an opinion. I understand an application was made to the learned judge at the trial, which in the exercise of his discretion he did not see fit to comply with. I do not know what might have been proved if that had been done, but of course looking at the fact that Moorhouse had been some time out of possession, it is quite possible that a case may have been set up of surrender by operation of law and an agreement to accept the existing tenants in place of Moorhouse.

The plaintiffs appealed.

May 23. *Charles, Q.C.*, and *S. Hall* (*Gully, Q.C.*, with them), for the plaintiffs. The tenancy of Moorhouse was never determined, his tenancy was a yearly tenancy created by parol, and the 32 Hen. 8, c. 34, has no application. But the subsequent statute 4 Anne, c. 16, does apply. There was sufficient interest left in Moorhouse after his assignment to Swan and Hadwen to satisfy the words of the statute. The relation of landlord and tenant still remained. Shier could have sued Moorhouse for use and occupation notwithstanding Moorhouse's assignment: *Waddilove* v. *Barnett* (1); *Shine* v. *Dillon* (2); *Gibson* v. *Kirk* (3): Comyns' Digest, Debt (E.) The assignee of the reversion by force of the statute stands in the same relation to Moorhouse as Shier did. A yearly tenancy differs from an ordinary term. It is only a tenancy for one year with a contract for a future tenancy on the same terms. The tenant cannot assign it like an ordinary term. He still remains tenant to the original lessor until his estate is

(1) 4 Dowl. 347.

(2) 1 Ir. L. Rep. C. L. 277.

(3) 1 Q. B. 850.

1882

ALLCOCK v. MOORHOUSE.

determined by the lessor accepting the new tenant: *Elliott* v. *Johnson*. (1)

Ambrose, Q.C., and *R. Henn Collins*, for the defendant, were not called on.

JESSEL, M.R. This is an appeal from a judgment of the Divisional Court sustaining the nonsuit which had been directed by the judge at the trial. I am entirely of the same opinion as to the point under discussion. This point has been argued before us as well as a great many others which it is not necessary now to decide.

Moorhouse was tenant from year to year under a parol demise; he assigned his estate, right, interest, and term in the premises by deed to Messrs. Swan and Hadwen. From that time he ceased to have any estate or interest in the property; but it was alleged that he was still under a liability to Shier, because Shier had refused to accept the assignees as his tenants. I assume that he remained still liable to Shier, though I am not prepared to decide that he did so remain, when Shier assigned his reversion by way of mortgage to the plaintiffs. The plaintiffs bring this action against Moorhouse who has never attorned to them. Assuming then for the sake of argument that Shier would have had a right of action against Moorhouse, it does not follow that the plaintiffs have a right of action against him. They are the assignees of Shier's estate, not of any contract with him. The question is whether any right of action was given them by the statute 4 Anne, c. 16. Before that statute they certainly could not have maintained an action against Moorhouse. But did that statute give any such right? Sect. 9 enacted that "all grants and conveyances of any reversions or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes without any attornment of the tenants of any such reversions, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant and depending as if their attornment had been had and made." Can these words apply to a person who has no particular estate in the

(1) Law Rep. 2 Q. B. 120.

land? In my opinion it is quite clear that Moorhouse had no particular estate, and that the statute did not apply to such a case.

Then it was argued that assuming that Moorhouse had no estate left in him, he was still, as between himself and Shier, liable for the rent and for use and occupation. But if so he would be liable on his contract and not in respect of any estate. The cases only decide that in certain circumstances a man may remain liable to his lessor after he has parted with his estate.

Then it is said that a yearly tenancy is not like an ordinary term, but is an estate for a year plus a contract for a continuance of the occupation which is not assignable at Common Law. I think it would have been assignable at Common Law. It is a term altogether of a peculiar kind. It is either a present or a future interest in the land, and as such is assignable, if not at Common Law, at all events under the statute 8 & 9 Vict. c. 106, s. 6. If it is a present interest it is assignable at Common Law; if a future interest it is assignable under that statute. The result is that Moorhouse had no particular estate in him on which any reversion or remainder was expectant or depending; therefore the statute of Anne has no application. The appeal must be dismissed with costs.

LINDLEY, L.J. I am of the same opinion. The question whether this action is maintainable depends upon the 9th section of the statute 4 Anne, c. 16. Mr. Charles argued that Moorhouse after his assignment was still to some extent tenant to Shier. The first contention was this. The plaintiffs try to make out by certain authorities that Shier could still have maintained an action of debt for use and occupation against Moorhouse, and that possibly may be so; and *Shine* v. *Dillon* (1) was cited to show that Moorhouse still occupies the land, and that he is liable for the rent. But *Shine* v. *Dillon* (1) does not shew this. The ratio decidendi in that case was that an action on contract was maintainable against the original tenant; not that he was liable in respect of his estate, but that he was liable in contract. None of the cases which have been cited shew that Moorhouse had any

(1) 1 Ir. L. Rep. C. L. 277.

1882

ALLCOCK v. MOORHOUSE.

estate left in him after his assignment. When once it is established that Moorhouse had no estate or interest in the land, the statute of Anne has no application. I am of opinion that the Divisional Court was right. There is neither privity of estate nor privity of contract between the plaintiffs and Moorhouse.

Appeal dismissed.

Solicitors for plaintiffs: *Cooper & Sons, Manchester.*

Solicitors for defendant: *Pritchard, Englefield, & Co., for W. Mann, Manchester.*

M. W.

July 1.

[IN THE COURT OF APPEAL.]

THOMPSON *v.* FARRER.

Ship—Detention of British Ship—"Unfit to proceed to Sea without serious Danger to Human Life"—"Reasonable and Probable Cause for Provisional Detention of Ship"—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *ss.* 6, 10.

The plaintiff was the owner of a British ship named the *L.*, which was at the British port of S., and was intended to be employed in the foreign cattle trade. Certain surveyors of the Board of Trade reported in doubtful terms that owing to her unusual proportions the *L.* was an unsafe ship. The Board of Trade thereupon ordered the *L.* to be provisionally detained. A court of survey was held as to the condition of the *L.*, and the members thereof reported that the *L.* was not unsafe, and that she ought not to have been detained. The *L.* was accordingly released. The plaintiff then brought an action against the secretary of the Board of Trade to recover compensation for the loss to him by reason of the provisional detention. At the trial it was admitted that the *L.* was a safe ship. The judge in substance directed the jury to consider whether it was reasonable in the Board of Trade to detain the *L.* for survey without a direct affirmation by their surveyors that in their opinion she was unsafe:—

Held, a misdirection; for the proper question to be left to the jury was whether the facts with regard to the *L.* as she lay at S., which would have been apparent to a person of ordinary skill on examining her and inquiring about her, would have given him reasonable and probable cause to suspect her safety and to detain her for survey and inquiry.

ACTION against the secretary of the Board of Trade to recover compensation for the provisional detention of the plaintiff's ship, the *City of Limerick*.

The facts are sufficiently stated in the judgment of Brett, L.J., hereinafter set forth.

1882

THOMPSON v. FARRER.

May 20, 25, 26. *Charles Russell, Q.C.*, and *Gainsford Bruce*, for the plaintiff.

Sir H. James, A.G., and *Gully, Q.C.* (*R. S. Wright*, with them), for the defendant.

The following cases were cited in the course of the argument: as to the meaning of the phrase "reasonable and probable cause:" *Hicks* v. *Faulkner* (1); as to whether the question of the existence of reasonable and probable cause can be a question for the determination of a jury: *Burns* v. *Nowell.* (2)

Cur. adv. vult.

July 1. The following judgments were delivered:—

BRETT, L.J. In this case the plaintiff was the owner of an iron steamship, the *City of Limerick*. In the autumn of 1880 the ship was at Sunderland, preparing to proceed with an ordinary cargo to America and to return with a cargo partly consisting of cattle. Whilst the ship was thus preparing to carry out such purposes, the officials at Sunderland of the Board of Trade communicated with the Board in London. In the result the ship was provisionally detained under the Merchant Shipping Act Amendment Act, 1876, by an order of the Board of Trade. Afterwards, under the same statute, a court of survey was held before Mr. Rothery and others, who held and reported as follows: "The conclusion, then, to which we have come is, that whether we look to the outward or to the homeward voyage this vessel is not unfit to proceed to sea without serious damage to human life, having regard to the nature of the service for which she is intended, and that consequently the Board of Trade officers had no right to detain her. Under these circumstances we have no option but to order the vessel to be released forthwith." The vessel was accordingly released. The present action was then brought by the plaintiff in order to recover compensation for the loss to him by reason of the provisional detention. The case was tried before the Lord Chief Justice and a special jury at Liverpool. The jury found for the plaintiff. A motion was made in a Divisional Court for a new trial for misdirection, and as for a verdict against the

(1) 8 Q. B. D. 167. (2) 5 Q. B. D. 444.

1882.

THOMPSON v. FARRER.

Brett, L.J.

weight of the evidence. Field, J., and North, J., refused to grant a rule. A rule nisi was afterwards granted in this Court, and upon shewing cause the case was exhaustively argued before my Brother Cotton and myself.

At the trial before Lord Coleridge, C.J., it was admitted, for the purpose of that trial, that the ship was in fact a safe ship for the proposed voyages both out and home. The following facts, amongst others, were given in evidence: first, as to the construction and former use of the ship, evidence in accordance with the statement of fact contained in the judgment or report of Mr. Rothery; then certain letters from officers of the Board of Trade at Sunderland to officers of the Board in London to the following effect: on the 21st of April, 1881, Mr. Mills, a surveyor of the Board stationed at Sunderland, wrote to the assistant secretary in London. "*City of Limerick.* An application has been made for a passenger certificate. She has been until recently a vessel with two decks and a spar deck. Her present owners have now fitted her with an additional awning deck about four-fifths of her length. The ship presents a curious and abnormal appearance, and a question arises in the minds of the surveyors and with myself how far such a superstructure on a vessel of already great depth and small breadth detracts from her seaworthiness. I therefore beg to submit that it is a case wherein the opinion of the consultative staff should be taken. The case is urgent, as the vessel is soon to leave Sunderland for America." A minute was made on this report by Captain Sir Digby Murray, an official of the Board. "I should advise that we absolutely decline to grant this vessel a passenger certificate. There still remains the question whether we are to permit her to proceed to sea or whether we ought not to detain her as unsafe. We should send Mr. Wilmshurst, &c., to survey." On the 28th of April, Messrs. Mills & Wilmshurst made a joint report: "We have now inspected this vessel, &c. Above the spar deck is now being added the frames, beams, planks, &c., for a further deck covering or platform, extending about four-fifths of the vessel's length, for the conveyance of cattle, &c. The following considerations arise, &c., as to whether from the great depth to breadth and the danger of the top structure getting partly filled with water, the

1882

THOMPSON v. FARRER.

Brett, L.J.

ship is in such condition as that she may be allowed to sail on a sea voyage. We think it is possible with special loading and provisions that she may be made safe to leave the United Kingdom; but she will without doubt be dangerous when loaded in a usual method or with cattle upon the upper deck. We therefore suggest the desirability of the Board leaving the responsibility of such an altogether exceptional case upon a court of survey." Upon this the following minutes were made in London: "Our duty is clear. Instruct Mr. Mills that we have received his joint report, and we understand that he will detain this ship if she attempts to proceed to sea. That being so, he should take care that the steps he takes are effectual." And by the President of the Board, "I approve of what has been done. The owner may be told that the Board of Trade will not take the responsibility of allowing a ship of such unusual dimensions to go to sea without further inquiry." On the 2nd of May Mr. Mills wrote: "May I respectfully suggest that others of the Board's staff who have experience of the trade this vessel is intended for should be sent to see her at once? The case is a heavy one for me to be left with alone; besides the opinions of Mr. Wilmshurst and myself as given in our report might not be in accord with that of others." Evidence was given that the ship had formerly brought cattle on deck from America covered or protected by a movable wooden awning or shed, and that shortly before May, 1881, the plaintiff had replaced this by a permanent structure said to be lighter, made partly of iron and partly of wood, to act as a shed or an awning for cattle, and that the ship was intended to bring cattle on deck in such shed from America to England on a homeward voyage. The ship was provisionally detained on the 14th of May. By a report dated the 16th of May, signed by Mr. Wilmshurst, principal surveyor of iron vessels, by Laslett, Brown, and Paxton, shipwright surveyors, and by Vyvyan, nautical surveyor, the grounds of the provisional detention were stated to be "improper construction, viz., unusual proportions," and after giving the length, breadth, and depth of the ship there was a statement that these formed "a proportion unknown in the merchant service in any other vessel." The Lord Chief Justice left the following questions to the jury: 1. Had the Board of Trade, when the detention

1882

THOMPSON v. FARRER.

Brett, L.J.

order was issued, reason to believe that the *City of Limerick* was unsafe for the outward voyage or for the homeward voyage?—A. No, to both branches of the question. 2. Was she unsafe in point of fact on the voyage to New York?—A. No. 3. Was the *City of Limerick* unsafe for the voyage from New York to England if loaded with an ordinary cargo of American produce, including as part of the cargo 500 head of cattle on the main or upper deck?—A. No. 4. Was there an absence of reasonable and probable cause, by reason of the condition of the ship or the act or default of the owners, for the provisional detention of the ship by the Board of Trade?—A. Yes. 5. From what date was the ship in point of fact detained?—A. From the 14th of May to the 11th of June.

The Lord Chief Justice, in summing up the case to the jury, thus explained the 4th question: "You would expect to find, as in my judgment you do find, that where there is a bonâ fide and honest action on the part of that great department of the state, if that action is wrong, and in a particular case inflicts hardship upon an individual, that individual if the action of the Board of Trade is bonâ fide and has been upon reasonable grounds, for the general benefit must suffer." And again: "The true question for you to consider is, had the Board of Trade at the time when the vessel was detained, reason to believe when they so acted, that the vessel was unsafe for her outward or her homeward voyage? The true question is what was present to their minds when they did detain." And still more clearly: "As I understand it, and I think rightly understand, therefore Mr. Mills was wrongly informed, and Mr. Mills wrongly informed the Board of Trade, but remember in my view the question is not whether he wrongly informed the Board of Trade, but whether he did inform the Board of Trade, and whether it was reasonable for the Board of Trade to believe what he informed them." "The Board can only go by the reports of their people, and so long as they have reason to trust those people and those people do not give them reasons to doubt the trustworthiness of their report, or give them reason to doubt that they can be relied on, I do not see why they should be held blameworthy or responsible under this particular Act of Parliament." The learned judge then left it to the jury

to say whether the letters and reports of Mr. Mills and Mr. Wilmshurst did give the Board reasonable ground to detain the ship. And he further said that if the question of the absence of reasonable cause was for him, he was of opinion that there was an absence of reasonable cause. The ground of this view of the learned judge, and a ground which he left to the jury to consider in order to determine their verdict, was that the report and letters did not express a determined opinion of Mr. Mills and Mr. Wilmshurst that the ship was unsafe; but rather seemed to avoid, and in his view did avoid, giving such an opinion; and that it was not reasonable for the Board to detain the ship without having at least a definite opinion that the ship was unsafe.

The same view is expressed by Field, J.: "I think there can be no doubt that if the statements of the surveyors had been direct and pointed statements of fact, even although mistaken, and although they had erroneously supposed that that was a deck which was not a deck, and that that which was merely a supplementary alteration was a new construction, or that that which they thought added 7 feet to the depth of the ship was, with reference to the question whether she was stable or not, erroneous, still, if all that had been positively stated to the Board of Trade by their respective officers, whose competency was not at all doubted, and they had taken it all into consideration, however unfounded or erroneous the views or statements of facts might have been, we should have thought that there would have been very strong evidence indeed to shew that there was no absence of reasonable and probable cause." But relying on the same point as the Lord Chief Justice, namely, that the surveyors declined to pledge their opinion that the ship was unsafe, he states that he cannot disagree from the finding that, even subject to the manner of leaving the question to the jury, there was an absence of reasonable and probable cause.

Upon the argument before us many points were raised. In order the better to express my views on them, I think it well to state in the first place my opinion on the construction of the statute. The first section with which in this case we have to deal is s. 6. That section *gives power* to the Board of Trade, a high executive state department, to interfere with the rights of

1882

THOMPSON v. FARRER.

Brett, L.J.

private subjects over their private property. It would be anticipated that the exercise of such a power so as to be absolutely justified in the end would be expressly confined to certain limited cases: in other words, that such a power so to be justified would only be given on the existence of certain conditions. And so we find that it is not given in respect of every British ship, but only where certain conditions exist with regard to a British ship: "Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as 'unsafe') may be provisionally detained for the purpose of being surveyed and either finally detained or released." This is the part of the enactment *which gives the power;* the remainder of the section deals with the manner in which the power thus given is to be exercised. The power then is not given with regard to every British ship. The enactment is not that an absolutely justified power is given to provisionally detain every ship which the Board of Trade has reason to believe is unsafe. If that be the construction, then all this first part of the section has no effect, and therefore no practical meaning. The only ships which can justifiably in the end be provisionally detained, according to this preliminary part of the section, are those which satisfy the condition that for one or other of the reasons mentioned they are unsafe. But by sub-sect. 1 "The Board of Trade, if they have reason to believe on complaint or otherwise that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed." Here a power is given to the Board to order the provisional detention, *if they have reason to believe*, &c. This must if possible be read so as not to destroy the immediately preceding enactment. The only way to read the two enactments together so as to give effect to both is to say that the Board *may* detain a ship if they have reason to believe she is unsafe (they would in my opinion *be bound* by their duty to the state to detain a ship if they had reason to believe she was unsafe), but that the Board will be proved by the result to have detained the ship

unjustifiably as against the owner, even provisionally, if in fact the ship was not by reason of one of the mentioned causes unsafe within the meaning of the section. I would remark here that it is perhaps possible that a ship may be unsafe within the meaning of the section for some cause other than one of the causes mentioned in the section, and if so, such a ship, though unsafe, could not properly be provisionally detained.

A question was raised as to whether the consideration of safety, or want of it, must be confined to safety or want of it on an outward voyage. It was urged that it must be, by reason of the words, "unfit to proceed to sea," and from "a port in the United Kingdom." But it seems to me that the words, "having regard to the nature of the service for which she is intended," enlarge the area of consideration. If for any part of the service for which the ship is intended when she is about to leave a port in the United Kingdom, such service to be fulfilled before her return to the United Kingdom, she would be unsafe, it seems to me she ought to be provisionally and finally detained. If a British ship were about to sail in ballast to the Chincha Islands to there load and bring back a cargo of guano, and she would be unsafe to human life to bring back such a cargo, it seems to me that she would be proceeding to sea for a service for which she was destined at the time of proceeding to sea, and for the performance of which service she would be an unsafe ship. Or if a British ship were under charter to leave a British port in ballast to proceed to Spain to load ore, and thence to proceed to some other country, it seems to me that it would be far too narrow a construction of the protection to human life intended by this statute, if such a ship might not be detained, if with a cargo of ore she would be unsafe to human life: she would be about to proceed to sea destined to perform a service for which she would be unsafe. Sub-s. 3 gives power to the Board of Trade to order "the ship" to be finally detained, either absolutely or until the performance of certain conditions. But "the ship" which may be so detained is a ship satisfying the conditions mentioned in the first part of the section. The conditions in the first part of the section are therefore conditions precedent to *a perfect right* to detain a ship either provisionally or finally. But they are not conditions precedent

1882

THOMPSON v. FARRER.

Brett, L.J.

to *a duty* on the part of the Board of Trade to provisionally detain. The Board is bound to perform a duty to the state which is hazardous to this extent, that the performance of it may be shewn by a result which at the time the Board could not foresee to have been an unjustifiable act as against an individual. All the difficulty pressing upon the Board by reason of its duty to act on information which it cannot sift in time, and on its grave responsibility to the state if it allow an unsafe ship to go to sea, must be admitted. Nevertheless, in my opinion, the duty to act under such difficulties is imposed. Now although the action of the Board, unless justified by the result of inquiry, is an unjustifiable act as against the shipowner, yet if no particular remedy were given to him by this or some other statute, he would have no remedy. The wrongful act would be a wrongful act done by the members of a public department acting gratuitously, and in the performance of a public duty. Yet the injury done to a shipowner by the detention of his ship at the moment of her proceeding to sea is usually so enormous, that if it were allowed to be done with impunity against one whose ship was not in fact unsafe, and more than that, was not in truth liable, if the true facts were known, to a just suspicion of being unsafe, such legislation would seem to be legislation of the highest injustice. A perfectly innocent individual would by legislation be grievously injured without redress. The legislature was placed in a position of great delicacy; it was anxious to protect certain subjects, it was bound not too arbitrarily to injure others. The result was s. 10. By it "if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey." Several questions arise as to the meaning of this enactment. It clearly does not go so far as to say that the shipowner shall be compensated if in fact his ship was not unsafe; to so hold would strike out the words, "that there was not reasonable and probable cause." Does it say that he shall not be compensated, if there was reasonable and probable cause *present*

to the minds of the Board from information before them, though there was not reasonable and probable cause if the true state of facts had been before them? It seems to me that so to hold would strike out the words, "by reason of the condition of the ship or the act or default of the owner." In order to justify the suggested interpretation the section should have been, "if it appears that there was not reasonable and probable cause for the provisional detention of the ship," &c. Then although neither the apparent condition of the ship nor any apparent act or default of the owner would have given to any person of ordinary skill any reason to doubt the safety of the ship, yet if incorrect facts had been stated to the Board of Trade, either through want of skill to appreciate them, or through negligence, or even fraudulently, such facts if they had been true being sufficient to raise a reasonable doubt, the shipowner would be without remedy. A shipowner, so absolutely innocent that not even by misfortune could his ship be an object of suspicion to a person of ordinary skill, would have been deeply injured without remedy. Such legislation would have inflicted frightful injustice. It may be hard but it is not unjust to say that if by misfortune or otherwise a ship does fairly present a suspicious aspect, the shipowner must bear the consequences. It seems to me that the words of the enactment, if effect be given to all of them, carry out the intermediate view, the hard view but not the unjust one. The true interpretation seems to me to be that if upon the evidence given at the trial of what by all means of examination possible under the circumstances in which the ship then was and all reasonable inquiries *might have been made known*, though it was not, to the Board of Trade, a person of ordinary skill would have had reasonable and probable cause so far to suspect the safety of the ship as to make it reasonable to detain her for the purpose of inquiry, the shipowner has no remedy given to him, though his ship was in fact a safe ship; but if upon such evidence a person of ordinary skill would have had no reasonable and probable cause to suspect the ship, then compensation is given to the shipowner, although the facts erroneously stated to the Board of Trade would, if correct, have given to a person of ordinary skill reasonable and probable cause to suspect, and consequently detain the ship. This

1882

THOMPSON v. FARRER.

Brett, L.J.

reading is, in my opinion, fortified by considering the next part of the section, which seems to be an enactment of reciprocal liability imposed on the shipowner, and which liability clearly depends upon the result in fact and not upon any statements or appearances of facts. It seems to me to be also fortified by s. 11. That section assumes that the Board of Trade may be liable to the shipowner, and may yet have a remedy over against a complainant; that would hardly have been enacted if upon the facts asserted to the Board there would be an absence of reasonable and probable cause to detain a ship, and yet the Board should detain her. It is clear that if the ship was in fact unsafe, no question can arise as to whether the information laid before the Board was or was not sufficient to give reasonable and probable cause to detain the ship. In such case the shipowner can have no right to compensation.

A question was raised as to whether the Board of Trade could rely upon any other deficiency than the one stated in their notice of detention, and of the reasons for it. As, for instance, if the reason given for the provisional detention were a leak in the bows of the ship, could evidence be given at the trial that, although there was no such leak, there would have been apparent to any ordinary skilful observer a defect in the engines, or in the rudder, or in the masts? Putting upon s. 10 the interpretation stated above, which seems to me to be the right one, I think that the suggested evidence could be given, subject, no doubt, to fair notice being given of it to the shipowner before the hearing.

Another question raised was whether the question of reasonable and probable cause ought to be left to a jury, or be decided by the judge. In my opinion, the question of reasonable and probable cause, if material, is never a question for the judge except in the cases of a charge of malicious prosecution or false imprisonment. It is not unnatural that in those cases it should be left to him, because the question in those cases is, whether there was reasonable and probable cause to set the law in motion or to act personally on it. But however that may be, it seems clear to me that from the very nature of the case the meaning of *this* statute must be that it is a question for the jury, to the solution of which they may be assisted by expert evidence. To ask a judge whether

upon certain measurements of length, depth, and breadth a ship would have sufficient stability, or whether with a cargo loaded in a given form she would be safe, is on the face of the proposition to my mind absurd.

Another point raised was whether among the facts which might be proved in order to raise the question above stated as the question to be tried by the jury, the previous history of the ship as to antecedent behaviour might be proved. In my opinion it might. No reasonably skilled and careful inquirer would, if anything struck him as amiss in a ship, fail, in my opinion, to ask whether what he observed had existed in previous voyages, and whether it had affected the behaviour of the ship. The previous behaviour of the ship under the same conditions as would affect her on her proposed going to sea, would, in my mind, be an obvious and necessary fact to be considered in determining whether she would be safe or unsafe.

An objection was taken to the view of the statute, which I think is the right one, on the ground that the legislature would be imposing a duty on the Board of Trade and obliging them to pay damages in respect of the performance of that duty; but this objection seems to me to be more formal than accurate. If the members of the Board of Trade were made by the decision personally liable, this objection would be formidable indeed; but in fact the duty is imposed on the Board, the damages are paid by the state.

Upon the view thus expressed of the true interpretation of this statute it follows that in my opinion the right question was not left to the jury. The verdict of the jury was taken upon the question whether it was reasonable in the Board of Trade to detain the ship for survey without a direct affirmation by the surveyors that in their opinion the ship was unsafe. The attention of the jury was not drawn to this question, namely, whether the facts with regard to this ship as she lay at Sunderland, which would have been apparent to a person of ordinary skill if he had had all means of examining her possible under the circumstances in which she lay at Sunderland, and of inquiring about her, and had used those means, would have in the opinion of the jury given to such person reasonable and probable cause so far to suspect the

1882

THOMPSON v. FARRER.

Brett, L.J.

safety of the ship for her outward or homeward voyage as to give him reasonable and probable cause to detain the ship for survey and inquiry. I am sorry to say under these circumstances that in my opinion there must be a new trial if the Board of Trade think it advisable. The appeal must in my opinion be allowed.

COTTON, L.J. The construction of the 6th section of the Merchant Shipping Act, 1876, is open to some difficulty. It has been contended that the vessel being in fact unsafe is a condition precedent to the exercise of all the powers given by the section. But this cannot, in my opinion, be the true meaning of the earlier part of the section which gives rise to this argument. For if this is the true construction, a vessel could not lawfully be detained, even for the purpose of being surveyed, unless she is in fact unsafe. This is inconsistent with the first subdivision, which expressly gives power to detain provisionally if the Board of Trade have reason to believe the ship is unsafe, and the contention is inconsistent with the first part of the section itself, which assumes that a ship coming under the provisions of this part of the section may be released, which in the case of a ship in fact unsafe would not be right. The section is not very correctly framed, but I think its meaning is that a ship which the Board of Trade have reason to believe to be unsafe may be detained, and after such investigation or inquiry as by the section is binding on the owner, either released or finally detained. The first part of the section in my opinion sums up, though not very accurately, the subsequent detailed provisions of the section.

But though as a matter of public policy it was thought right that a power should be given to the Board of Trade to detain provisionally ships reasonably believed by the Board to be unsafe, it was obvious that this might produce great hardship to owners of some vessels, and the 10th section gives in certain cases to owners of vessels which have been detained, and which in fact are not unsafe, compensation by way of damages for their detention, this compensation being payable not by the officers of the Board but by the State out of the public purse. In this section the language used differs from that of the 1st subdivision of the

6th section. It is not "if the Board had not reasonable cause," but "if there was not reasonable and probable cause," that is, if in fact there was not such cause, and it must exist by reason of the condition of the ship or the act or default of the owner. This, in my opinion, means that the existence of the cause is not to be decided on the representations made to the Board of Trade, on which they acted, but is to be decided on the actual condition of the vessel, on what in fact has been done by the owner, so as to prevent the owner being injured by reason of inaccurate representation made to the Board of Trade either by its officers or by strangers, even in cases where the Board has properly discharged the public duty which the Act enables and requires the Board to discharge, and this is supported by s. 11.

Then comes the question by whom is the existence of reasonable cause to be decided, by the judge, or by the jury. This does not depend on matters of which a judge has any special knowledge, as is the case where the question is whether there was probable cause for a criminal prosecution. In my opinion, therefore, it must be decided by the jury, and I think the question for the jury (when a vessel is said to be unsafe by reason of her condition) is, whether a reasonable man with a competent knowledge of ships would have believed from the actual condition of the ship that she was unsafe. In some cases the construction of the vessel, without any reference to her previous history, may be sufficient to enable the jury to decide this question, and in my opinion it cannot be said that in all cases evidence ought to be given as to the history of the vessel, but I think that evidence as to the actual history of the vessel is admissible to shew that she is or is not unsafe, or that there was or was not reasonable and probable cause for believing her to be unsafe.

The only other question is, whether in deciding whether there was reasonable and probable cause for believing the ship to be unsafe, regard is to be had to the outward voyage only. In my opinion where the contemplated employment of the vessel is for a purpose which involves more than the outward voyage, as, in the present case, the bringing cattle home from the United States, or, in other words, employment in the foreign cattle trade, this employment after the end of the outward voyage is part of "the

1882

THOMPSON v. FARRER.

Cotton, L.J.

service for which she is intended" and must be taken into consideration. Full protection would not otherwise be secured to seamen employed in British ships, and having regard to the words quoted from s. 6 it is within the fair interpretation of the Act.

The result of my opinion is that in the present case the proper question was not left to the jury, and that the verdict cannot stand. The defendant desires to contend before a jury that the ship was not in fact safe, that is, to question the finding of the court of inquiry. This he did not on the previous trial do in consequence of an expression of opinion by the Lord Chief Justice that the question was whether the Board of Trade had reasonable ground on the statement submitted to them for believing that the vessel was unsafe, and the defendant ought, if he claims it, to have an opportunity of raising the question. There must therefore be a new trial.

Appeal allowed.

Solicitors for plaintiff: *Botterell & Roche, for William Pinkney, Sunderland.*

Solicitor for defendant: *Solicitor to the Board of Trade.*

J. E. H.

June 12.

CLARKSON *v.* MUSGRAVE AND SONS.

Master and Servant—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42) *s.* 7—*Notice of Action, Sufficiency of—Cause of Injury—County Courts—County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6—*Appeal—Point not raised at Trial—Condition Precedent.*

In an action to recover compensation for injuries under the Employers' Liability Act, 1880, the plaintiff's notice of action stated that she was injured in consequence of the defendants' negligence in leaving a certain hoist in their warehouse unprotected whereby her foot was caught in the casement of the hoist and crushed. At the trial, the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing the plaintiff, a young girl, to go in the hoist alone:—

Held, that the notice of action sufficiently stated the "cause of the injury" within s. 7 of the Employers' Liability Act, 1880.

It is a condition precedent to the right to appeal under s. 6 of the County Courts Act, 1875, that the question of law upon which it is desired to appeal should have been raised before the county court judge at the trial.

ACTION in the Bolton County Court to recover damages for personal injuries under the Employers' Liability Act, 1880.

The plaintiff, Jane Clarkson, a girl under the age of fourteen, sued by her father as her next friend.

The action was tried with a jury, and the material facts on the judge's notes, were as follows:—

Jane Clarkson was employed in the defendants' cotton mill as a "doffer," her duty being to take bobbins off the frames and to carry them away in baskets. Clarkson, having been ordered by her doffing mistress to fetch some bobbins from the cellar of the mill, went down from the ground floor to the cellar in a hoist, the key of the hoist having been given to her by the doffing mistress. The cage of the hoist was closed on three sides and open on the fourth to allow egress through the door of the hoist. Whilst returning in the hoist from the cellar, some of the bobbins, which Clarkson had procured and placed in baskets in the cage, fell out of one of the baskets, and in stooping to pick them up, Clarkson's foot slipped and was caught and crushed between the wall and the unprotected side of the cage.

There was evidence that it was the duty of the doffing mistress to accompany girls sent in the hoist, and that it was a rule of the mill that they should not be allowed to go alone.

The jury gave a verdict for the plaintiff, with 20*l.* damages, and in answer to questions put to them by the judge they found that the negligence was the negligence of the doffing mistress, and that there was no negligence in leaving the hoist unprotected, or otherwise in respect of the hoist.

The plaintiff's notice of action, served on the defendants under s. 7 of the Employers' Liability Act, 1880, stated that Jane Clarkson "was injured in consequence of your negligence in leaving a certain hoist in your warehouse unprotected, whereby the said Jane Clarkson had her foot caught in the casement of the said hoist, and her foot and leg were severely injured, and the said J. Clarkson will claim compensation for such injuries."

The judge was asked to take a note of the evidence given at the trial, but it was not contended before, or suggested to, him on behalf of the defendants, that there was no evidence for the jury of liability under the Employers' Liability Act, though it was contended that the notice of action was bad.

A rule was obtained on behalf of the defendants, calling on the

1882

CLARKSON v. MUSGRAVE.

plaintiff to shew cause why judgment should not be entered for the defendants, or a new trial had, on the grounds that no sufficient notice of action was given, and that there was no evidence for the jury of liability under the Employers' Liability Act, 1880.

Bosanquet, for the plaintiff, shewed cause. The notice of action sufficiently states the cause of injury within s. 7 of the Employers' Liability Act. (1) The cause of the injury was the unprotected side of the cage, and the space between the cage and the wall. It is not necessary to state the cause of action with technical accuracy. A notice of action in ordinary language, which substantially gives the employer notice of the occurrence upon which the action is founded, is enough. If there is any defect in the notice the defendants were not in any way prejudiced or misled thereby, so that the notice ought not to be deemed invalid.

As to the second ground upon which the rule was obtained, the point that there was no evidence of negligence for the jury should have been taken at the trial, and the judge should have been asked to nonsuit the plaintiff: *Rhodes* v. *Liverpool Commercial Investment Company* (2) is a direct authority that it is a condition precedent to the right to appeal under s. 6 of the County Courts Act, 1875, (3) that the question of law on which it is sought to

(1) Sect. 4 of the Employers' Liability Act, 1880, provides "That an action for compensation under the Act shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury," &c.

By s. 7, "Notice in respect of an injury under this Act shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer, upon one of such employers. . . . A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

(2) 4 C. P. D. 425.

(3) By the County Courts Act, 1875, s. 6: "In any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight

1882

CLARKSON v. MUSGRAVE.

appeal should be raised at the trial. *Seymour* v. *Coulson* (1) does not conflict with that view, the decision being only that a request to take a note was not a condition precedent to the right to appeal, and the Judges of the Court of Appeal expressly refrained from holding that it was not a condition precedent that the question of law should be raised. Nor does *Morgan* v. *Rees* (2) affect the question for determination in this case.

Crompton, Q.C., for the defendants, supported the rule. First, the notice of action is bad. The jury have found that the injury was caused by the negligence of the mistress in sending the child in the hoist alone. The notice should have alleged that negligence as the cause of action, instead of alleging negligence in leaving the hoist unprotected. The injury must be stated in writing: *Keen* v. *Millwall Dock Company*. (3)

Secondly, it is not a condition precedent to the right to appeal under s. 6 of the County Courts Act, 1875, that the judge should be asked to take a note of the evidence, or that a question of law should be raised at the trial. Where a note has in fact been taken the Court, on appeal, can see exactly what took place, and has all the materials for deciding the question of law. It is contended that *Seymour* v. *Coulson* (1) has overruled *Rhodes* v. *Liverpool Commercial Investment Co.* (4)

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days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings, as to the Court to which such motion shall be made shall seem fit, and, if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers; and at the trial or hearing of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding; and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons; and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal."

(1) 5 Q. B. D. 359.
(2) 6 Q. B. D. 508.
(3) 8 Q. B. D. 482.
(4) 4 C. P. D. 425.

1882

CLARKSON v. MUSGRAVE.

FIELD, J. I am of opinion that this rule should be discharged. It is contended for the defendants that a condition precedent to the plaintiff's right to sue has not been complied with, because a sufficient notice of action under s. 7 of the Employers' Liability Act has not been given. It is clear that the notice is a condition precedent to the right to sue; the question therefore is whether the notice in question here is a good notice under the Act. I think it comprises everything which the language of s. 7 requires. It states that the cause of injury was leaving the hoist unprotected, and the evidence at the trial was that in coming up by the hoist the girl's foot slipped and was injured by reason of the cage being protected only on three sides. The cage was sufficiently protected for persons of full age and skill, but not for persons of this girl's age. The jury found in effect that the mistress ought not to have allowed the child to go in the hoist by herself, and that the negligence which caused the injury was the negligence of the mistress. But in determining whether or not the notice of action is good the Court cannot enter into the question of proximate or remote cause. The statute was intended for the use of unlearned persons, for whom it meant to provide a cheap and speedy remedy. Sect. 7 only requires that the notice of action shall state "in ordinary language the cause of the injury." It is not necessary to state the cause of action, but only that which will enable the employer to have substantial notice of what has occurred, so that he may make proper inquiries, and may come to trial prepared to meet the plaintiff's case. This is clear from the language of the section, which provides that the notice "shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading. A notice although defective is still therefore a notice under the section. I am of opinion that the notice in this case sufficiently complies with the provisions of the Act.

The next question is, whether or not it is open to the defendants' counsel to raise the point here that there was no evidence upon which the jury could reasonably find such negligence as would make the defendants liable under the Employers' Liability Act.

That point was not raised at the trial, and the question depends upon whether s. 6 of the County Court Act, 1875, requires that it should have been raised as a condition precedent to the defendants' right to raise it here. It is important that the code under which appeals from county courts are brought should be well settled. Before the passing of the County Courts Act, 1875, the only mode of appealing was by a case stated by the judge, and the appeal did not lie upon any question of fact. It was thought necessary to give suitors a right of appeal not depending entirely upon the judge's discretion, and the legislature therefore gave the remedy by s. 6 of the County Courts Act, 1875. But the appeal given by that section is limited, as the appeal was before, to questions of law, and it must be brought by a person "aggrieved by the ruling, order, direction, or decision of the judge." Then the section provides further that at the trial or hearing the judge shall, at the request of either party, "make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon," and he shall furnish a copy of the note so taken by the person requiring the same for the purpose of appeal. I am clearly of opinion that every question of law upon which it is desired to appeal must be raised at the trial. Unless it is, there is no "ruling, order, direction, or decision of the judge" within s. 6 upon which to appeal. In actions in the High Court, where evidence is tendered at the trial and admitted without objection, so that there has been no ruling of the judge with respect to its admissibility, the rule is invariable that the admissibility cannot be questioned on appeal.

The object of the provisions of s. 6, is clearly to let the opponent of the party who asks for the note to be taken know what the question of law is, and to give him the opportunity of meeting it by necessary evidence. The judge must be asked to decide the question of law, and it is of great importance that he should be asked to take a note of the evidence relating thereto, both in the interest of the opponent, and in order that this Court on appeal should have a complete and clear record of what the point raised at the trial was, and of the judge's decision upon it.

1882

CLARKSON v. MUSGRAVE.

I should, therefore, be prepared to decide on principle that no appeal lies under s. 6, except against the decision of the judge upon a point of law taken at the trial. But the case of *Rhodes* v. *Liverpool Commercial Investment Company* (1) is, I think, a decisive authority in favour of my view. It is said that the decision in that case has been in effect reversed by *Seymour* v. *Coulson*. (2) I do not think so. On reading the judgments of the Court of Appeal in the latter case I find that every judge expressly guards himself against being supposed to hold that it was not necessary to take the point before the county court judge. In that case the questions of law were raised, and the judge did take a note of the evidence though he was not requested so to do, and stated the questions of law on his note. The Court of Appeal held that the mere fact of his not having been asked to take a note, did not destroy the right of appeal. I agree with that decision, and I think it would be a hard construction of the Act not to allow an appeal under those circumstances. In the present case the point that there was no evidence for the jury was never raised or suggested to the judge at the trial. I am of opinion therefore that *Rhodes* v. *Liverpool Commercial Investment Company* (1), is an authority, which stands untouched by *Seymour* v. *Coulson* (2), or *Morgan* v. *Rees* (3), for the proposition that a question of law upon which it is desired to appeal under s. 6 of the County Courts Act, 1875, must be taken before the county court judge at the trial.

CAVE, J. I am of the same opinion. I think the notice of action complies with the provisions of s. 7 of the Employers' Liability Act, 1880. The notice is not required to state the cause of action, but only the cause of injury, and the notice in this case does sufficiently state the cause of injury, which was that the space between the cage of the hoist and the wall was left unprotected. The jury came to the conclusion that there was no negligence in leaving that space unprotected, because it was the duty of the mistress always to go with a child sent in the hoist. Sect. 7 provides that if the notice of action be defective or inaccurate it

(1) 4 C. P. D. 425. (2) 5 Q. B. D. 359.
(3) 6 Q. B. D. 508.

shall not be deemed invalid, unless the defendant in the opinion of the judge would be prejudiced in his defence by reason of the defect or inaccuracy. The county court judge was not asked to come, and could not come, to any such conclusion with respect to this notice. It is not alleged that the defendants were in any way deceived by it. As to the other point, the only question of law raised at the trial was with respect to the notice of action, and, the judge having been asked to take a note on that question, and having taken one, the defendants now desire to raise upon this rule another and an entirely distinct question of law, of which the plaintiff had no notice at the trial. It would be wholly contrary to the principle of the Act if this could be done. All the cases, including *Seymour* v. *Coulson* (1), recognise this at least—that the point must be taken at the trial, when it might be cured by evidence, and ought not to be taken for the first time on appeal, upon notes sent up to this Court for the purpose of raising another and a distinct point of law.

Rule discharged.

Solicitor for plaintiff: *M. Fielding, Bolton.*

Solicitors for defendants: *Johnston and Harrison, for R. & T. H. Winder, Bolton.*

(1) 5 Q. B. D. 359.

W. A.

Distinguished. R. *v.* PWLLHELI JUSTICES. [1948] 2 All E.R. 815.

June 12. THE QUEEN ON THE PROSECUTION OF SHAW *v.* LEE AND OTHERS, JUSTICES OF WAKEFIELD.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 258 —*Justices of the Peace—Bias—Disqualification—Town Council—Urban Sanitary Authority.*

By s. 258 of the Public Health Act, 1875, "no justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority."

In the borough of Wakefield the sanitary committee of the town council, who were the local authority under the Public Health Act, 1875, passed a resolution directing the town clerk to prosecute S. for exposing for sale meat unfit for human food, contrary to the provisions of the Act, and at the hearing of an information laid in pursuance of this resolution S. was convicted before four justices of the borough, who imposed a penalty upon him. One of the justices was a member of the sanitary committee, and had been present at the meeting at which the resolution was passed:—

Held, that s. 258 did not remove the disqualification which attached to the justice by reason of his having acted as a member of the sanitary committee in directing the prosecution, and that a rule for a certiorari to bring up and quash the conviction must be made absolute.

RULE calling upon W. H. Lee and three other justices of the borough of Wakefield, to shew cause why a writ of certiorari should not issue to bring up a conviction by the justices for the purpose of quashing it.

At a petty sessions holden for the borough of Wakefield on the the 19th of April, 1882, Benjamin Shaw was convicted before the justices upon an information by H. Morgan, the town clerk, and clerk to the urban sanitary authority of Wakefield, of exposing for sale meat unfit for human food, contrary to the provisions of ss. 116 and 117 of the Public Health Act, 1875. The justices imposed a penalty of 5*l.* and costs. The information was laid under s. 251 of the Public Health Act, 1875, and the penalty would go, under s. 254, to the local authority. The Mayor and Corporation of Wakefield are the urban sanitary authority for the borough under the Public Health Act, 1875.

The prosecution against Shaw was instituted in pursuance of a resolution passed at a meeting of the sanitary committee of the borough, and approved by a resolution passed at a subsequent

1882

THE QUEEN v. LEE.

meeting, directing the town clerk to take such steps as he deemed advisable against Shaw.

W. H. Lee, one of the justices who sat at the hearing of the information when Shaw was convicted, and acted as chairman of the justices, was a member of the corporation and of the sanitary committee, and was present at the meeting at which the latter resolution was passed, and concurred in the resolution.

The rule was obtained on the ground that W. H. Lee was disqualified by interest from sitting as a justice on the hearing of the information.

Lockwood, for the justices, shewed cause. The justice was not disqualified from sitting at the hearing of the information, the disqualification being removed by virtue of s. 258 of the Public Health Act, 1875. *Reg.* v. *Handsley* (1) is a clear authority to shew that the fact that a justice of the peace for a borough has a pecuniary interest in the result of an information as a member of the town council, or that the corporation of which he is a member are the prosecutors, does not disqualify him from sitting. He must have such a substantial interest as might give him a real bias in the matter. In that case the section of the Local Act, which authorized the justice to act though he was a member of the town council, was similar in effect to s. 258. *Reg.* v. *Meyer* (2) differs from this case because the justice there had such a substantial interest as might give him a real bias in the matter. So also in *Reg* v. *Milledge* (3) there was a substantial interest likely to bias the justices, because the corporation would themselves have been liable in respect of the continuance of the nuisance if they had failed in their prosecution. *Reg.* v. *Huntingdon* (4) is also in point in favour of the contention for the justices.

Tindal Atkinson, in support of the rule, was not heard.

FIELD, J. I am of opinion that s. 258 of the Public Health Act, 1875, has not the effect of enabling a person to act as prosecutor and judge in the same matter. It would require express

(1) 8 Q. B. D. 383.
(2) 1 Q. B. D. 173.
(3) 4 Q. B. D. 332.
(4) 4 Q. B. D. 522.

1882

THE QUEEN v. LEE.

terms in an Act of Parliament to produce that effect. I think the meaning of s. 258 is clear. It was thought that there might be inconvenience in carrying out the Act owing to the difficulty, in boroughs, of getting justices to sit who were not members of the corporation. The legislature therefore went one step in the direction of removing that difficulty by enacting that the mere fact of membership should not disqualify the justice. The section therefore removes one ground of interest merely. There is no warrant for holding that, where the justice has acted as a member by directing a prosecution for an offence under the Act, he is a sufficiently disinterested person as to be able to sit as a judge at the hearing of the information. I am of opinion that the rule must be made absolute, but this being a criminal matter the Court has no power to give costs.

CAVE, J. I am of the same opinion.

Rule absolute. (1)

Solicitor for prosecutor: *Seaton F. Taylor, for E. & T. Clark, Snaith.*

Solicitors for justices: *Jackson & Evans, for Scholey, Wilson, & Leatham, Wakefield.*

(1) See *Reg.* v. *Justices of Yarmouth* (8 Q. B. D. 525).

W. A.

LOOKER *v.* WRIGLEY AND OTHERS.
LEIGH *v.* WRIGLEY AND OTHERS.

June 21.

Building Society—Building Society's Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 15, 16, 43—*Rules—Borrowing Powers—Deposits or Loans in excess of Limits prescribed by the Act—Liability of Directors—Overdrawn Banking Account, whether a "Loan" within the Act.*

By s. 15 of the Building Societies Act, 1874, any society under the Act may receive deposits or loans at interest from the members or other persons within the limits provided by the section; and in a terminating society the total amount so received on deposit or loan and not repaid may either be a sum not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force.

By s. 16 the rules of every society shall set forth whether the society intends to avail itself of the borrowing powers contained in the Act, and if so within what limits not exceeding the limits prescribed by the Act

By s. 43, if any society receives loans or deposits in excess of the limits prescribed by the Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess.

Where by the rules of a terminating society the amount to be received upon deposit or loan was limited to an amount not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members:—

Held, in an action against the directors under s. 43, that they were personally liable in respect of sums received by the society on deposit or loan in excess of the limit prescribed by the rules, notwithstanding that the amount received on deposit or loan did not exceed the other of the alternative limits prescribed by s. 15:

Held, also, that a loan at interest to the society from its bankers, secured by deposit of title-deeds, and made by allowing the society to overdraw its account at the bank, was a "loan" within the meaning of s. 15.

THE action of *Looker* v. *Wrigley and Others* was brought under s. 43 of the Building Societies Act, 1874, to recover a sum of 300*l.* deposited by the plaintiff with the defendants, a benefit building society.

The action was entered for trial at the Manchester Assizes in February, 1881, when it was agreed, with the leave of the Court, that the record should be withdrawn, and a special case stated for the opinion of the Queen's Bench Division, both in the action of *Looker* v. *Wrigley and Others* and in several other actions

1882

LOOKER v. WRIGLEY.

LEIGH v. WRIGLEY.

(including *Leigh* v. *Wrigley and Others*) then pending against the same defendants.

The material facts stated in the case with respect to the actions of *Looker* v. *Wrigley and Others* and *Leigh* v. *Wrigley and Others* were as follows:—

The defendants at all times material were the directors and committee of management of the Golden Fleece Benefit Building Society at Rochdale. The rules of the society, as subsequently registered, were drawn and framed prior to the 11th of February, 1876, and the defendants on that day met and held what purported to be the society's first meeting, and accepted certain loans, and made advances, and took certain mortgages in the name of the society as security for the same, and during the period between the 11th of February and the 3rd of March, 1876, the defendants received deposits or loans at interest on behalf of the society. The society was, on the 3rd of March, 1876, incorporated, registered, and formed under the Building Societies Act, 1874 (37 & 38 Vict. c. 42) (1) as a terminating society.

Rule 11 of the registered rules of the society limited the total amount of money to be received by the society upon deposit or loan to an amount not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members.

(1) Sect. 15 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), enacts, with respect to the borrowing of money by societies under the Act, that (sub-s. 1), "Any society under this Act may receive deposits or loans at interest within the limits in this section provided from the members or other persons . . . to be applied to the purposes of the society."

Sub-s. 2: "In a permanent society the total amount so received on deposit or loan, and not repaid by the society, shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members."

By sub-s. 3: "In a terminating society the total amount so received, and not repaid, may either be a sum not exceeding such two-thirds as aforesaid, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force."

By s. 16, the rules of every society hereafter established under this Act shall set forth (sub-s. 2), "Whether the society intends to avail itself of the borrowing powers of this Act, and if so within what limits, not exceeding the limits prescribed by this Act."

By s. 43, "If any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess."

1882

LOOKER v. WRIGLEY.

LEIGH v. WRIGLEY.

On the 16th of March, 1876, the society's solicitor, with the defendants' authority, received a deposit or loan from the plaintiff Looker to the amount of 300*l.*, and that sum was paid by the solicitor into the society's bank to the credit of the society.

At the date upon which this deposit or loan was made, excluding mortgages given to the society prior to the 3rd of March, there was nothing whatsoever secured to the society by mortgages from its members, but the amount received by the defendants on behalf of the society by way of deposits or loans at interest did not at that date exceed (including Looker's loan) the amount of twelve months' subscriptions on the shares of the society in force.

On the 13th of April, 1876, the defendants received on behalf of the society a deposit or loan of 1800*l.* from the plaintiff in the action *Leigh* v. *Wrigley and Others*. Prior to this deposit or loan (and exclusive of the same), taking into account a loan at interest from the bankers of the society of 6593*l.*, which was secured by the deposit of deeds of property upon which the society had mortgages, the defendants had received deposits or loans at interest on behalf of the society to an amount exceeding two-thirds of the amount secured to the society by mortgages from its members, but the two-thirds limit would not be exceeded if the sum of 6593*l.* were deducted from the amount of deposits or loans at interest received by the defendants on behalf of the society.

The sum of 6593*l.* had been lent at interest by their bankers to the society to enable it to make increased advances on mortgage to its members, and had in fact been so employed the day before Leigh's loan was made, and the advances so made formed part of the amount secured to the society by mortgages from its members. The society's account at the bank was a fluctuating one. Shortly before the sum of 6593*l.* was advanced the society had changed their bankers—their former bankers having been unwilling to advance so large a sum. The Court were to have power to draw inferences of fact.

If the Court were of opinion that the defendants were liable to the respective plaintiffs in all or any of the actions, judgments were to be entered up in such actions for the successful plaintiffs respectively for such amount as the Court should direct. If the

1882

LOOKER v. WRIGLEY.

LEIGH v. WRIGLEY.

Court were of opinion that the defendants were not liable, judgments were to be entered for them with costs.

C. Russell, Q.C. (*Smyly*, with him), for the plaintiffs. The facts stated in the case bring the defendants within the express words of s. 43. In both cases they have received on behalf of the society loans to an amount exceeding the limit declared by rule 11. The rules having been made under the Act, the limit prescribed by them is the "limit prescribed by the Act" within the meaning of s. 43.

Gully, Q.C. (*Crompton, Q.C.*, with him), for the defendants. Sect. 43 imposes upon the directors a new liability, apart from any liability at common law. They are made liable from the mere fact of being directors, though they may not have been personally guilty of any negligence. By the terms of s. 43 this liability accrues only when the society in exercising its borrowing powers has exceeded the "limits prescribed by the Act," and those limits are the alternative limits prescribed by s. 15. It is contended that the legislature did not intend to make every director personally liable where the society borrowed money in excess only of the limit mentioned in the society's rules.

It is also submitted that in Leigh's case the amount of the society's over-draft upon its bankers ought not to be taken into account in estimating the amount received on deposit or loan. Sub-s. 5 of s. 15 contemplates that in cases of loans or deposits within the section there must be a deposit book, or some acknowledgment or security given, upon which the whole of ss. 15 and 16 are to be printed or written. Admitting that where bankers allow an over-draft it is a loan from them to the society, still it is not a loan within the meaning of s. 15. In the case of *In re Cefn Cilcen Mining Co.* (1) it was held that an overdrawn account at their bank was not a loan to a company within the articles of association, which prohibited the company from contracting loans beyond a certain amount; and *Waterlow* v. *Sharp* (2) decided that a mere overdrawing in the regular course of business was not a loan by their bankers to a railway company which could be questioned as a borrowing ultrâ vires, although the sum which

(1) Law Rep. 7 Eq. 88. (2) Law Rep. 8 Eq. 501.

the railway company were permitted to overdraw was entered in the bankers' books under the title "loan account."

Smyly was not heard in reply.

DENMAN, J. I am of opinion that the loans made to the defendants, and the amounts secured by mortgages to them, prior to the 3rd of March, 1876, the date upon which the society was incorporated and registered, do not come within the operation of s. 43 of the Act, not being transactions by the society so as to make the directors personally liable under that section. The facts stated in the case shew that, excluding mortgages to the society prior to the 3rd of March, there were no sums on mortgage on the 16th of March, the date of the plaintiff Looker's loan. It is nevertheless contended that the defendants are not liable under s. 43, because although the advance was, at the time it was made, in excess of any moneys secured by mortgages to the society, still the amount of deposits or loans received by the society was not in excess of the twelve months' subscriptions to the society, and therefore the directors are not brought within the terms of s. 43 coupled with s. 15. This contention raises the main question in the case—what is the construction of s. 43 taken in connection with ss. 15 and 16. I think the three sections must be read together. Sect. 15 provides alternative limits which a terminating society may adopt at their option. But if they are to have borrowing powers at all, they must, under s. 16, state in their rules which of the alternative limits they do adopt. It would not, in my opinion, be a good statement if the rules declared, "The society's limit is one or other of the limits mentioned in s. 15, according to whichever limit best serves their purpose at the moment." If my construction of ss. 15 and 16 is the true one, the society here are bound by the limit declared by rule 11, and that limit is a sum not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members.

It has been ingeniously argued by the defendants' counsel that s. 43, which renders the directors personally liable in respect of amounts received on deposit or loan "in excess of the limits prescribed by the Act," must be construed as meaning prescribed by

1882

LOOKER v. WRIGLEY.

LEIGH & v. WRIGLEY.

the Act and not by the rules, thus leaving both the limits mentioned in s. 15 still open, so that if the amount received on deposit or loan does not exceed one of the two limits, the directors would be exempt from liability. I think that is a fallacious construction, and one which would defeat the object of the Act. That object is to provide definite limits which the society are bound to choose between in making their rules, and when once the rules are made adopting a particular limit, that is the limit prescribed by the Act. It follows, therefore, that the defendants are liable.

In Leigh's case, if the amount of the loan at interest received by the society from their bankers be excluded, the amount of the loans to the society would bear the necessary proportion to the sums secured to them by mortgage. It is argued for the defendants that the bankers' loan ought to be excluded. The words of s. 15, subs. 1, are general, covering any sort of "deposit on loan at interest from members or other persons," and the case expressly finds that the sum received from the bankers was a loan at interest to the society. There is nothing in the Act to distinguish loans by bankers from loans by other persons, and I think the Court would be legislating, and not fairly construing the Act, if it were to hold that any such distinction existed. The cases cited are not in point here. The decisions turned upon particular facts, which differ from those found in this case. Looking at the reason of the thing it is obvious that the object of the legislature would be frustrated if a building society might carry on business to any extent upon funds borrowed from their bankers, and still not be subject to the restriction of s. 43. In Leigh's case, therefore, I am also of opinion that the plaintiff is entitled to judgment.

POLLOCK, B. I am of the same opinion. I agree with my Brother Denman that, on the true construction of s. 43, the limits prescribed by the Act are the limits prescribed by the rules made in compliance with s. 16. Sect. 15 provides two alternative limits which may be adopted in the rules, and the society elected in the present case to adopt the first alternative. That, in my opinion, is the limit prescribed by the Act within the meaning of s. 43. I agree also that the transactions before the date of the incorpora-

tion and registration of the society should be excluded from computation in determining whether loans at interest received by the society were in excess of the limits prescribed by the Act. As to Leigh's loan, I am of opinion that, in computing the amount at that time received by the society on deposit or loan at interest, it would be wrong to exclude the loan to the society from their bankers. Two cases were cited in which the question was discussed whether a mere overdraft on bankers is to be treated as a loan to the customers. Of these *Waterlow* v. *Sharp* (1) comes nearest to the present case. There the bankers, for their own purposes, set up a loan account with their customers, a railway company, and allowed them to draw cheques against that account. I confess to having some doubt whether I could agree with the decision if it applied to this case. But the facts stated here clearly shew that the society were unable to carry on business without obtaining assistance from their new bankers, and they obtained it by receiving this loan, which carried interest and was secured by deposit of title deeds. I am unable to conceive what could constitute a "loan at interest" if this did not. It is within the words and spirit of the Act. It would be enabling the society to evade the Act, and would foster the worst mischief the Act intended to deal with, were the Court to hold that loans of this nature from bankers were not to be taken into account in determining whether the society had received loans or deposits in excess of the prescribed limits.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Hughes & Beadles, for Hartley, Son, & Osborne, Rochdale.*

Solicitors for defendants: *Clarke, Woodcock, & Ryland, for Standring & Taylor, Rochdale.*

(1) Law Rep. 8 Eq. 501.

W. A.

1882
May 5.

[IN THE COURT OF APPEAL.]

WESTON AND OTHERS *v.* THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT.

Landlord and Tenant—Covenant in Lease against carrying on Offensive Trade —Extra Rent reserved in case of Breach of such Covenant—Forfeiture.

The defendants were assignees of the lease of certain premises which had been demised by the plaintiffs for a term of years, the reddendum being as follows: "yielding and paying a yearly rent of 30*l.* by equal quarterly payments" on the usual quarter days, "and a like yearly rent of 25*l.* by like equal payments in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises shall be carried on or done."

The lessees, among other usual covenants, covenanted not to carry on upon the premises certain specified trades or businesses, nor any offensive, noisome, or noisy trade or business whatsoever, nor do nor suffer to be done anything which might be or grow to the damage or annoyance of the lessors. The lease contained a condition of re-entry if the said yearly rent of 30*l.* or the said further rent of 25*l.*, in case the same should become payable, were in arrear, or if and whenever there should be a breach of any of the covenants thereinbefore contained on the part of the lessees.

The defendants having carried on upon the demised premises a business within the terms of the above-mentioned covenant, the plaintiffs sued to recover the premises upon a forfeiture of the lease:—

Held, affirming the decision of the Queen's Bench Division, that the lease could not be construed as meaning that the defendants were entitled to carry on the business in question upon payment of the additional rent mentioned in the reddendum, and that the plaintiffs were entitled to re-enter under the condition for re-entry should they choose to exercise that option, instead of requiring the payment of the additional rent.

APPEAL from the decision of the Queen's Bench Division, allowing a demurrer to the statement of defence, in an action for the recovery of certain premises upon a forfeiture for breach of covenant in a lease granted by the plaintiffs to persons of whom the defendants were assignees. (1)

The lease contained a covenant by the lessees not to carry on or suffer to be carried on upon the premises certain offensive trades or occupations which were therein specified, or any offensive, noisome, or noisy trade or business whatsoever, nor do or suffer to be done anything which might be or grow to the damage or

(1) Reported 8 Q. B. D. 387.

annoyance of the lessors. This covenant was broken by the defendants, and in respect of such breach the plaintiffs claimed to re-enter under the condition of re-entry in the lease for breach of any of the covenants.

The statement of defence set out the reddendum of the lease and the condition of re-entry. The reddendum was "yielding and paying therefor during the said term unto the lessors the yearly rent of 30*l.* by equal quarterly payments" on, &c., "and also yielding and paying unto the lessors the further yearly rent of 25*l.* by like equal payments, in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises shall be carried on or done," &c. The condition of re-entry was as follows: "Provided always that if the said yearly rent of 30*l.* hereinbefore reserved, or the said further rent of 25*l.*, in case the same shall become payable or any part thereof, shall be in arrear for twenty-one days, or if and whenever there shall be a breach of any of the covenants hereinbefore contained on the part of the lessees, then it shall be lawful for the lessors to re-enter upon the premises and the same to have and repossess as in their first and former estate, anything hereinbefore contained to the contrary notwithstanding."

The Divisional Court held that the lease did not give the lessees a right to carry on the offensive trades specified in the covenant on payment of the additional rent, but gave the lessors alternative remedies in case such trades were carried on, namely, of claiming a forfeiture or a payment of such additional rent, and the Court allowed the demurrer and gave judgment for the plaintiffs.

The defendants appealed.

Grantham, Q.C., and *E. Clarke, Q.C.* (*Proudfoot*, with them), for the defendants. The additional rent of 25*l.* is fixed as the rent to be paid for carrying on any of the offensive occupations on the premises which would otherwise be contrary to the covenant not to carry them on. It is the price agreed by the parties to be paid for so acting: *Woodward* v. *Gyles* (1); and it should be so construed rather than treated as a penalty: *Lowe* v. *Peers* (2)

(1) 2 Vern. 119. (2) 4 Burr. 2228.

1882

WESTON v. MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT.

and *Legh* v. *Lillie*. (1) The clause of re-entry must be taken to apply only to the breach of such covenant as is not otherwise dealt with, and not to the covenant not to carry on any offensive trade, which is dealt with by the stipulation that if the lessees do carry on such trade they are to pay an additional rent.

Sir H. Giffard, Q.C., and *Fullarton*, appeared for the plaintiffs, but were not called upon.

BRETT, L.J. I have no doubt about this case. I think that the decision of the Queen's Bench Division should be affirmed, and for the reasons given by that Court. In the lease in this case there are several covenants by the lessees to pay rent and to abstain from doing certain things, and then there is a clause of re-entry, which is in these plain and express terms: "that if the said yearly rent of 30*l.* hereinbefore reserved, or the said further rent of 25*l.* in case the same shall become payable, or any part thereof, shall be in arrear for twenty-one days, or if and whenever there shall be a breach of any of the covenants hereinbefore contained on the part of the lessees, then it shall be lawful for the lessors to re-enter upon the premises." The question is, whether there is anything in the lease to cut down the generality of this clause. It is said that there is in the reddendum, which contains a stipulation that in case there shall be any breach of the lessee's covenant not to carry on any offensive or noisome trade, the lessees shall be liable to pay an increased rent of 25*l.* a year. If that stipulation were so drawn as to be incapable of being read without cutting down the clause of re-entry, that is to say, if the two could not be consistently read together, then I suppose it must be read as cutting down the clause of re-entry. But the rule is that one must read all the parts of a document together, unless they are so inconsistent that this cannot be done, and it seems to me that both the clause of re-entry and the stipulation as to rent can be made consistent if they be read, as they were in the Court below, to mean that an option shall be given to the lessors to re-enter if they please in case of any breach, or if they prefer not to re-enter, to require the lessees to pay the increased rent. It is said that this is unilateral, and in favour of the land-

(1) 6 H. & N. 165.

lord, but the same might be said of other covenants. It seems to me that the two clauses may be read together in the way I have stated, and that therefore this appeal must be dismissed.

COTTON, L.J. I am of the same opinion. In case of the breach of the covenant not to carry on any of the therein specified trades an additional rent is stipulated to be paid by the lessees, and it is said that that is inconsistent with the right of re-entry in respect of that same breach of covenant. I think, however, that that argument is not maintainable. It is optional with the lessors whether they will or not avail themselves of the clause of re-entry, or whether they will adopt the alternative, and claim the additional rent. The additional rent is only to be paid if the term continues after the act which is the breach of covenant has been done. The lessors may then, if they please, determine the tenancy, but if they do not do so, but are willing to keep the lessees as their tenants, then the lessees are to pay the additional rent. Of course, a question may arise whether the further rent of 25*l.* is payable as liquidated damages, or whether so much only is payable as amounts to the damage done by the breach of covenant, but no such question arises here, where the lessors have not in the exercise of their option claimed the additional rent.

Appeal dismissed.

Solicitors for plaintiffs: *Perkins & Weston.*
Solicitors for defendants: *Charles Rogers, Sons, & Russell.*

W. P.

1882

June 8.

Re JOEL EMANUEL & CO.

Solicitor and Client—Costs in County Court—Work done before and after Action—Scale of Costs and Charges in Actions under 20l.—County Courts Act, 1875 (38 & 39 *Vict. c.* 50), *s.* 8; 19 & 20 *Vict. c.* 108, *s.* 36.

The scale of costs and charges in actions in the county court under 20*l.* framed in pursuance of 38 & 39 Vict. c. 50, s. 8, does not prevent a solicitor from recovering charges other than those specified in the scale for work done out of Court before and after the commencement of an action, although there has been no agreement in writing for further costs under 19 & 20 Vict. c. 108, s. 36.

Motion by way of appeal from an order of Stephen, J., dismissing an application to review the master's taxation of a bill of costs.

It appeared that the bill of costs was delivered by Messrs. Joel Emanuel & Co., solicitors, to the firm of Isaac, Druiff & Co., and was referred to the master for taxation as between attorney and client. The solicitors were retained to collect a number of debts under 20*l.*, which they had done by proceedings in the county court, and various items in their bill were objected to on the ground that they were not allowed by the scale of costs framed under the County Courts Act, 1875, 38 & 39 Vict. c. 50, s. 8. Among these items were the following:—Zielinski's case: Attending county court to ascertain if instalments paid into court, 3*s.* 4*d.*; attending you thereon, 3*s.* 4*d.*; writing defendant, 3*s.* 6*d.*; attending you taking further instructions, 3*s.* 4*d.*; attending to issue execution, 3*s.* 4*d.*; attending searching return by high bailiff, 3*s.* 4*d.*; attending informing you, and as to further inquiries, 3*s.* 4*d.* Punter's case: Instructions to issue execution, 3*s.* 4*d.*; attending issuing execution, 3*s.* 4*d.*; attending you on your instructing us to see bailiff, 3*s.* 4*d.*; attending bailiff, 6*s.* 8*d.* Gill's case: Attending you consulting on a claim against Mr. Gill, 6*s.* 8*d.*

All these items were allowed by the master, on the ground that they were for business done out of court and not regulated by the scale of costs.

1882

RE EMANUEL

W. G. Harrison, Q.C., and *Littleton*, for the applicant. The material question upon the present application (1) is, whether in respect of the county court proceedings which he has taken the solicitor can recover costs and charges not included in the scale framed under 38 & 39 Vict. c. 50, s. 8. This scale in actions where the amount recovered does not exceed 20*l.* allows specified charges on, first, letter before action; second, instructions for and preparing particulars and attending and entering plaint; and third, attending or acting in court: and this specification of charges was intended to exclude any right to recover items such as those allowed by the master. It is true that under 9 & 10 Vict. c. 95, s. 91, allowing the solicitor 15*s.* only for appearing and acting in the county court, it was held that the amount applied only to the appearing and acting of the solicitor in court, and not to his services out of court in advising and getting up the case: *In re Toby* (2), overruling *In re Clipperton.* (3) Now, however, by 19 & 20 Vict. c. 108, s. 36 (4), a solicitor cannot in any county court suit where the claim is within 20*l.* recover any further costs "in the conduct of such suit" than those mentioned in 9 & 10 Vict. c. 95, s. 91, unless upon taxation it is shewn that the client has agreed in writing to pay further costs. Here there was no written agreement, and the Act applies, for the words "in the conduct of such suit" are large enough to include all the present items. The mention in the scale of "instructions for particulars" shews that it was meant to include all business before action, and the policy of the

(1) Other objections were taken to the Master's certificate, and overruled by the Court, which it is unnecessary to notice.

(2) 12 Q. B. 694.

(3) 12 Q. B. 687.

(4) 19 & 20 Vict. c. 108, s. 36: Where in any action the debt or damage claimed shall not exceed 20*l.* an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of suit than those mentioned in 9 & 10 Vict. c. 95, s. 91, unless upon taxation of costs the registrar be satisfied, by writing under the hands of the client, that he has agreed to pay further costs or charges; and in such case the registrar may allow any costs or charges not exceeding the amount which may have been so agreed to be paid.

38 & 39 Vict. c. 50, s. 8: Judges of county courts empowered to frame a scale of costs and charges to be paid to attorneys with respect to all proceedings authorized to be taken in such courts.

1882

RE EMANUEL

Act is to protect the client from heavy charges where the amount sought to be recovered is small.

McIntyre, Q.C., and *A. G. McIntyre*, appeared to shew cause, but were not heard.

DENMAN, J. This is an application to review the master's taxation and to reverse the order of Stephen, J., who declined to review it. The bill of costs was delivered by Messrs. Emanuel & Co. to Messrs. Isaac & Co. for work done in certain county court proceedings. Two or three objections have been made to the bill of costs:—[The learned judge discussed and overruled certain preliminary objections.] But the material point is whether the solicitors are debarred from claiming more than the items specified in the scale of costs and charges framed in accordance with 38 & 39 Vict. c. 50, s. 8, and it raises no doubt a question of some importance. Before the passing of the Act 19 & 20 Vict. c. 108, it was held in *Re Clipperton* (1) that 9 & 10 Vict. c. 95, s. 91, which limits the amount to be recovered for appearing and acting in the county court, applied to everything done by an attorney in regard to a suit in that Court, whether before, at, or after the hearing. This decision was practically overruled by *Re Toby* (2), where it was held that the section did not prevent an attorney from recovering more than the limited amount for services out of Court in advising or getting up the case in which he appeared and acted. The present question does not depend upon the law which prevailed at the date of those cases, but upon 19 & 20 Vict. c. 108, s. 36, which enacts that in County Court actions for amounts under 20*l.* solicitors shall recover no further costs "in the conduct of such suit" than those specified in 9 & 10 Vict. c. 95, s. 91, unless the client has agreed in writing to pay further costs and charges. Under the later Act, 38 & 39 Vict. c. 50, s. 8, a scale of costs and charges in actions for amounts under 20*l.* has been framed, and it was contended on behalf of Messrs. Isaac & Co. that inasmuch as there was no agreement in writing the solicitors could recover in respect of no items which did not appear in the scale of charges, and that this scale was intended to comprise

(1) 12 Q. B. 687. (2) 12 Q. B. 694.

every item before or after action, and that anything done before action or trouble taken afterwards cannot be subject of a claim. I do not think that the words "in the conduct of the suit" can be reasonably held to include such matters. Suppose no action is ever brought, surely as between attorney and client the labour in considering whether proceedings shall be taken must be paid for and allowed, inasmuch as it is quite as much out of the pocket of the solicitor as any other part of his claim. I think that the words "in the conduct of the suit" impliedly exclude the charges for such labour from the operation of the section. One of the items before us, which is for advising upon an action, is wholly different from that described as "Instructions for and preparing particulars." I cannot adopt the narrow view that it was intended to deprive the solicitor of the remuneration for services such as these I have described, and the order must stand.

POLLOCK, B. I am of the same opinion. The principal objection to this taxation involves a point of some importance. The object of framing a scale of costs and charges is not only that the solicitor may be fairly remunerated but to protect the client from claims to amounts inconsistent with the scale. It has been urged that there are charges in the bill before us which are distinct from those in the scale, and in nine cases out of ten it would be the duty of the master to exercise his discretion in considering whether the business done by the solicitor ought properly to have been included under the first head in the scale, "Instructions for and preparing particulars for an ordinary summons, and attending and entering plaint." The same question would practically arise in proceedings in the Superior Courts. The master has in such cases to consider whether the labour of the solicitor in ascertaining whether there is any right of action at all comes properly under the head of "Instructions to sue." Suppose no proceedings are taken. It is quite clear that the solicitor's charge would be for something not within the "conduct of the suit." But it would be strange and illogical if the test, of whether the solicitor is or is not to be paid for what may have involved long conferences with his client, is to be whether proceedings are or are not taken to recover a debt. It must also be observed that the scale is a

1882

RE EMANUEL

scale of costs and charges in "actions" under 20*l.*, from which it may be inferred that it was not intended to regulate proceedings out of Court. I think no ground for reviewing this taxation has been shewn.

Order affirmed.

Solicitors: *Joel Emanuel & Co., in person.*
Solicitors for applicants: *Grover & Humphreys.*

A. P. S.

April 21.

[IN THE COURT OF APPEAL.]

THE BOARD OF WORKS FOR THE HACKNEY DISTRICT *v.* THE GREAT EASTERN RAILWAY COMPANY.

Metropolis Management Acts—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Paving new Street—Owner of Land bounding or abutting on new Street—Railway in Cutting—Bridge carrying new Street over Railway.*

A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over the line on a bridge which was supported on stone piers erected by the railway company upon the slope of the cutting on either side of the line. The bridge had on either side a parapet wall, which was of brickwork, and went along the whole length of it, from one of the said piers to the other. The district board of works paved the road between the said walls of the bridge, and on an information under s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), against the railway company, for not contributing to such paving, the magistrate having found such road to be a new street:—

Held, that the railway company were, in respect of the parapet wall, the owners of land bounding or abutting on such street within the meaning of the 77th section, and liable, therefore, to contribute to such paving.

Reversed by L. R. 8 Q. B. 65.

CASE stated by one of the metropolitan police magistrates under 20 & 21 Vict. c. 43.

The respondents, the Great Eastern Railway Company, were summoned before one of the magistrates of the Worship Street Police Court to answer a complaint preferred on behalf of the appellants, the Board of Works for the Hackney District, for neglecting to pay to the board the sum of 74*l.* 2*s.* 8*d.* ordered to be paid by the railway company in respect of their share of the cost of paving the new street or road known as Cazenove

Road, Stamford Hill. The magistrate dismissed the summons, and stated the following facts:—

The respondents, under powers conferred upon them by an Act of Parliament, built a bridge carrying the Cazenove Road over their line of railway, which is in a deep cutting.

On the 6th of August notices were served upon the respondents demanding payment of the sum of 74*l.* 2*s.* 8*d.*, as their contribution towards the expenses of paving part of Cazenove Road, under the provisions of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), and the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), as owners of the Great Eastern Railway Company, for a frontage of the line of railway on the south side 44 feet 8 inches, and on the north side 48 feet.

The road carried over the line of the respondents crosses it, running east and west, on a bridge which is supported on stone piers erected by the railway company upon the slope of the cutting on either side of the line. No portion of the land of the respondents in respect of which it is sought to charge them, is or can be used for any other purpose than for their railway.

It was contended by the respondents that they were not the owners of land bounding or abutting upon the road within the meaning of the Acts.

The magistrate stated that he was of opinion that the facts were the same (except that he found the road to be a new street) as in the case of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), and that the respondents were not owners of land bounding or abutting upon the road within the meaning of the Acts.

The question stated for the opinion of the Court was whether the respondents were liable to pay the sum demanded to the appellants.

The Queen's Bench Division held that it was bound by the decision of the Exchequer Division in *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), and affirmed, therefore, the decision of the magistrate, but gave leave to appeal. The Board of Works appealed.

On the argument of such appeal photographs of the locus in quo were produced and referred to by the consent of both parties,

(1) 4 Ex. D. 239.

1882

BOARD OF WORKS FOR HACKNEY v. GREAT EASTERN RAILWAY CO.

and from these it was shewn that upon the slopes of the cutting, supported on either side by piers or buttresses which had been erected on their land by the railway company, was a wall formed of brickwork which went along the whole length of either side of the bridge, and served as a protection to passengers using the bridge.

April 20. *Sir H. Giffard, Q.C.*, and *Poland*, for the appellants. The question of the liability of the railway company arises under s. 105 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), and s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102). By s. 105 of the former Act power is given in certain cases to the vestry or district board to pave a new street, and when they have done so, it is enacted that "the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such payment." The 77th section of the Act of 1862 enacts that: "where any vestry or district board shall under the powers given by the 105th section" of the former Act "have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein." The last Act extends the liability from the owners of houses forming the street to the owners of land bounding or abutting on it, and there is no distinction made between land on the level and land not on the level with such street. The railway company might, if they please, build up to the level of the street, and their liability to contribute cannot depend on their having done so or not. At all events, the walls of the bridge are land belonging to the railway company, and as such bounding or abutting on the street within the meaning of the 77th section: *London and North Western Ry. Co.* v. *St. Pancras* (1) and *Higgins* v. *Harding*. (2) The present case was considered by the magistrate to be governed by the case of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (3), but there the road was held not to be a new street, and consequently the decision of the Exchequer Division

(1) 17 L. T. (N.S.) 654. (2) Law Rep. 8 Q. B. 7.
(3) 4 Ex. D. 239.

as to the line of the railway, and the slopes of the cutting not bounding or abutting upon the road within the meaning of the said 77th section, was unnecessary, and can only be treated as the dictum of the Court. The road is here expressly found to be a new street, and that must be between the walls of the bridge. *Arnett* v. *London and North Western Ry. Co.* (1) shews that a railway company having built a bridge over their line of railway, which bridge had become a street, might be rated for the wall on each side of the bridge, the wall being on the company's ground.

Charles, *Q.C.*, and *French*, for the respondents. In order to determine the meaning of the words in the 77th section, "land bounding or abutting on such street," one must ascertain what is the street on which it so bounds or abuts. "Could," says Hawkins, J., in *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (2) "the lands crossed by the high viaducts and railways bridges which are to be found in many parts of the country be said to bound or abut upon the roadway of the viaducts or bridges themselves?" There is really nothing which bounds or abuts on this road or street over the bridge but the wall of the bridge, and unless such is land there is no land bounding or abutting, except the land beneath the bridge on which the railway runs, which, as stated by Hawkins, J., cannot be considered as bounding or abutting on the road above it. The only case cited which is in favour of the wall being land bounding or abutting on the street is that of *London and North Western Ry. Co.* v. *St. Pancras* (3), but there the wall was built on the land of the railway company, and went along parallel with the street and separated it from the railway. The case of *Higgins* v. *Harding* (4) is rather against the case of the appellants. There the land, though used as a buttress for the railway embankment, clearly abutted on the road which had become a street. That case is far from deciding that land under a street which is carried over such land by a bridge, and which therefore has no physical contact with such street, abounds or abuts on it. The question is what is a street with reference to its thickness. In *Coverdale* v.

(1) 20 L. T. 80.
(2) 4 Ex. D. at p. 244.
(3) 17 L. T. (N.S.) 654.
(4) Law Rep. 8 Q. B. 7.

1882

BOARD OF WORKS FOR HACKNEY v. GREAT EASTERN RAILWAY CO.

Charlton (1) Brett, L J., says "'street' means more than the surface, it means the whole surface, and so much of the depth as is or can be used not unfairly for the ordinary purposes of a street." It is clear that the legislature only intended by the two Acts, 18 & 19 Vict. c. 120, s. 105 and 25 & 26 Vict. c. 102, s. 77, to extend the liability to contribute to the expense of paving a new street to owners of such land along the street on which houses were built or which was in the same position as houses; a mere wall such as the wall of a bridge is not such land as the legislature intended, it is in fact part of the bridge itself. Then, according to s. 46 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), as shewn by *North Staffordshire Ry. Co.* v. *Dale* (2) the road which the railway company carried over their railway by the bridge, having previously been a public highway, they will be bound to keep both it and the bridge in repair, such repair including not only the structure of the bridge, but the metalling the road. Again, by s. 68 of that Act of 1845, the company are bound to make and maintain bridges necessary for the purpose of making good any interruption caused by their railway to the use of the land through which the railway is made. If under either of these sections the company be liable to maintain and metal the road, they cannot be liable to contribute to the expense incurred by the district board in paving.

Sir H. Giffard, Q.C., replied.

Cur. adv. vult.

April 21. BAGGALLAY, L.J. The question is whether the Great Eastern Railway Company are liable to contribute to the expense of paving a certain street in the metropolitan district of Hackney, known as Cazenove Road. This road is a new street within the intent of the "Metropolis Local Management Act, 1855" (18 & 19 Vict. c. 120), and it was paved by the district board of works under the powers conferred upon them by the 105th section of that Act.

Under the combined operation of that section and the 77th section of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), the parties liable to contribute to the

(1) 4 Q. B. D. at p. 121. (2) 8 E. & B. 836; 27 L. J. (M.C.) 147.

1882

BOARD OF WORKS FOR HACKNEY v. GREAT EASTERN RAILWAY CO.

Baggallay, L.J.

expense of paving are, to use the language of s. 105, "the owners of the houses forming such street," and to use the language of s. 77, "the owners of land bounding or abutting on such street." The expression "the houses forming such street," has been recognised as meaning the houses which are contiguous to or have access to the street. In this case, before the Hackney District Board had anything to do with the paving of this street, the railway company, under the powers of one of their Acts of Parliament, constructed a railway in a deep cutting under and across the road, and a bridge over the railway by which the communication was maintained between one portion of the Cazenove Road and the other. It has been contended on the part of the Hackney District Board that the railway company are liable to contribute to the expense of the paving as being the owners of land bounding or abutting on the new street. On the other hand, the railway company have contended, in the first place, that they are not the owners of land bounding or abutting on the street; and, in the second place, that inasmuch as they are bound by their Act of Parliament to maintain and keep in repair the bridge which so crosses their railway, they are not liable to be assessed in respect of the paving of the street itself. As regards the first of these two questions the magistrate found, as a fact, that the road was a new street, but he held that the railway company were not the owners of land bounding or abutting on the road within the meaning of the Act. Now certainly we have been very materially assisted in this case by the photographs which have been produced and referred to by both parties in the course of their arguments, and it is quite clear, I think, that there is a wall standing outside the street which has been paved, and that the understructure which carries that wall is carried down to the land belonging to the railway company at the bottom. It appears to me clear that the wall by which the street is bounded on the one side and on the other, standing by reason of abutments on land, is all land. Whether that wall was put there for the purpose of a boundary or for the protection of passengers going over the bridge is quite immaterial; but it seems to me that it is a boundary of the street at that point and that it stands on land belonging to the railway company, and therefore is land of which the railway company are

1882

BOARD OF WORKS FOR HACKNEY v. GREAT EASTERN RAILWAY CO.

Baggallay, L.J.

owners. Some stress was laid by the respondents upon the case of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell.* (1) No doubt if there was no wall in the present case forming a margin of the street on either side then this case would very much resemble that of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), the magistrate felt himself bound by that case; and there does not appear either before him or before the Divisional Court to have been any distinction taken between the street itself and the wall bounding the street. The Divisional Court affirmed the magistrate's decision, but gave leave to appeal. Now, I do not feel it is at all necessary to say what opinion I should be disposed to hold if the whole of the bridge had constituted the street, and there had been no bounding wall as there was in the present case, though I do not wish it to be understood that I should be disposed to follow the case of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell.* (1) It is not necessary to do so, because a distinction appears to me to exist between that and the present case. A further argument was raised on the part of the respondents, namely, that inasmuch as the railway company were bound by their Act of Parliament to make and maintain for ever the bridge in a proper state of repair, therefore they could not be properly called upon by the district Hackney board to contribute to the expense of this paving. I confess I cannot understand that argument. A similar argument was raised in the case of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), but it was not considered necessary to consider the point, inasmuch as the Court decided in favour of the railway company upon another ground. It does not appear to me to follow, that, because as far as regards some special or supposed benefit to be derived by the owners of property on either side of the street they should be called upon to contribute rateably the expense of the original paving, they are not in any way liable for the future repairs when the paving is once established, and that, therefore, they are relieved from the liability imposed upon them by another Act of Parliament of keeping the bridge in a proper and continued state of repair. However it is not necessary to discuss that question now, and it is sufficient to say that it

(1) 4 Ex. D. 239.

appears to me that the railway company are clearly liable to contribute to the expense of paving the street, which is the only question we have to decide. This appeal must therefore be allowed.

BRETT, L.J. The learned judges in the Divisional Court considered themselves bound by the case of *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), but inasmuch as the Court in that case held that the place in question was not a new street, their decision on the other points becomes one of no binding authority, and the Lord Chief Justice and Manisty, J., might, therefore, notwithstanding that case, have given us the benefit of their opinion upon the present case, but they have not done so. In this case a bridge crosses the railway, the railway being in a deep cutting, and the Hackney District Board have treated the part of that bridge, which is the road, as a street, and the magistrate has found, as a fact, such road is a new street. This board paved it, and having done so they have called upon the railway company to contribute to the expense of the paving the whole length of the bridge from the beginning to the end. The question is whether they are entitled so to rate the railway company. They contend that they are upon two grounds, first, because they say that the railway company are owners, not only of the land on which the buttresses of the bridge stand, but of the land on which the rails are under the centre of this bridge, and that that is land which is abutting on, and which bounds the street, and that in respect of it they are therefore entitled to rate the railway company. Secondly, because the side wall which goes along the whole length of the bridge is to be considered as land which belongs to the company, and as the boundary of the street. With respect to the first contention it seems to me that in order to uphold it the Hackney District Board would be bound to contend, that even if the bridge did not belong to the company, and its buttresses were not built upon land of the company at all, yet if the company were owners of the land at the low level below up to the buttresses and under the bridge, the board would be entitled in respect of that land to rate the railway company for

(1) 4 Ex. D. 239.

1882

BOARD OF WORKS FOR HACKNEY v. GREAT EASTERN RAILWAY CO.

Brett, L.J.

the whole length of the bridge. Now, in order to solve such a question as that, one would have to consider the construction of the two statutes which have been referred to. The first statute (18 & 19 Vict. c. 120) affects houses only, and says that where there is a new street which has been paved by the local authority, the owners of the houses forming such street shall be liable to contribute to the cost of such paving according to their frontage. The second Act (25 & 26 Vict. c. 102) says that in the like case the owners of land bounding or abutting on such street shall be liable. That second statute I think applies to land which is in the same position with regard to the street as the houses are in the first Act. So that I do not agree exactly with Hawkins, J., in *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), that land in the second Act must be land on which a house could be built, for I think that is too narrow a construction. Neither do I think that the question can depend upon mere level; I can imagine a case where the land would be below the level of the street, and yet houses might be built upon it to which the access might be by steps from the level. I am not prepared to say upon the present occasion, because I do not think it is necessary to do so, whether such land so below the level of the street could be said to be bounding or abutting on the street.

It seems to me that it is sufficient to say that the railway company in the present case are the owners of land bounding or abutting on the street along the whole length of the bridge. That which is found to be a new street consists only of the width of the footway and carriageway. The walls which are along the whole length of the bridge on either side are no more part of the street than houses would be which bound the street. They form the street but are no part of the street. They are walls supported by brickwork or other permanent work fixed into the land, and they would exist just as they are if the whole centre of the bridge, that is to say, the whole of the street, were taken up, leaving these walls as the outsides of that bridge: there would then be no street, but there would be these walls, which, being built upon foundations which are on the land of the railway company, would be land belonging to the railway company. If then they

(1) 4 Ex. D. 239.

are not part of the street, what is their position to the street? Mr. Charles admitted, as he was obliged to do, that in the case of the Old London Bridge the houses on that bridge would be land bounding the street. So the Holborn Viaduct might have houses along the sides of it just the same as if it were a street built upon solid ground and not elevated. Then in the case of the bridge in the present case, the walls being land belonging to the company bound the street along its whole length. Now if the owners of the bounding land had been rated according to the value of such land, it might have been urged that there was no value in these walls, and that therefore the railway company could not be rated, but inasmuch as I understand parties are rated according to the frontage, the value of the walls becomes immaterial; and the railway company are therefore, in respect of that wall which is land of theirs, liable to be rated for the whole length of the bridge. Whether our decision is consistent or not with the first part of the decision in *London and Brighton Ry. Co.* v. *St. Giles, Camberwell* (1), I do not stop to inquire.

The only question remaining is the point which was taken by Mr. French. We are bound to assume that the road which goes across this bridge is a street, and a new street. The district board of works have then the right to pave it, and to call upon the railway company to contribute to the primary expense of that paving. Now is there anything to do away with that primâ facie right of the board? There is certainly no express provision that, in the case of a street over a bridge belonging to the railway company, which bridge they are to keep in repair, in that case if the street be paved, the railway company shall not pay the cost of such original paving. Is there anything by implication which limits the primâ facie right of the board? There cannot be such implied limitation unless there is some part of the statutes of the railway company which is inconsistent with such right of the board. It is said that there is such inconsistency, because before the road over the bridge was a street, the railway company had to keep it in a certain kind of repair, but not paved. I cannot conceive how that would be inconsistent with the right of the board to pave a street, and if they pave it, to call upon the railway

(1) 4 Ex. D. 239.

1882

BOARD OF WORKS FOR HACKNEY v. GREAT EASTERN RAILWAY CO.

company to pay the first cost of so paving it. Then it is said that we ought to decide whether, after the board has chosen to pave it, the railway company are bound to keep that pavement in repair. I beg leave to decline doing so, and shall leave that question to be answered hereafter whenever it shall be properly raised.

HOLKER, L.J. The main question in this case is whether the railway company are the owners of land abutting upon or bounding the street across this bridge of the railway company. This seems to me the only question, because the second question which was raised by Mr. French evidently was never in the contemplation of the magistrate or of the Divisional Court from which this appeal is brought. The railway company, as I understand, confess they are the owners of some land that abuts upon or bounds the new street. They are the owners of the piers and that portion of the wall which stretches from one side to the other, and which forms a parapet wall. Moreover, as I understand, the railway company are willing to pay, and have indeed paid, their proportion of the expense of the paving the street in respect of that part of the wall which is supported by the piers, and it is rather strange that having done that they should contend they are free from further liability. Now the question is, are the railway company the owners of land abutting upon or bounding this street? It has been contended on the part of the board that the whole land of the railway company below the street, that is to say, the slopes of the embankment, and the permanent way itself on which the rails are placed is land abutting upon the street. It is very difficult to say that all that land is land abutting upon the street, because the street does not extend from the surface down to the railway; and though it might perhaps be said that it bounds the street, that is not the view upon which I shall base my decision in this case.

The question is whether the railway company have land which abuts upon or bounds the street? and it does not matter whether that land will be benefited by the paving of the street or not, or whether it is land on which a house can be put. Now, it seems to me that it is clear that the wall, which I will call the parapet wall of the bridge, is legally land which belongs to the

railway company and abuts upon the street from one side to the other. It was decided that if you have land such as a railway running along the side of a street at a very considerable depth below it and separated from it by a wall, that comes within the Act of Parliament, and is land which abuts upon the street. Why does it abut upon the street? Because the wall is part of the land itself; and it has, therefore, been admitted in the present case that if this wall was a continuous wall built all along upon the permanent way of the railway and carried up to its present height it would be land belonging to the railway company which abutted on the street. Then is the wall not land belonging to the railway company because, instead of being built in a continuous fashion, a part of it is thrown across a chasm or open space? Can it be said that because this wall rests upon piers built upon either slope, and is supported in the centre by an archway which is constructed upon these piers that that wall is not upon the land of the railway company? The supports of the wall rest upon the land of the railway company, and the arch is constructed on the land of the railway company, and the centre of the arch which spans from one side to the other overhangs the land of the railway company. Supposing this wall instead of resting as it does upon an arch rested on a series of pillars on the land of the railway company with spaces between them, would it not be admittedly the land of the railway company.

For these reasons I think this parapet wall has become in law part of the land of the railway company, and is land abutting on the street within the meaning of this Act of Parliament. As to the other point, I have nothing to add to what my learned Brethen have said upon it, except that I think it never ought to have been advanced at all.

Appeal allowed.

Solicitor for appellants: *R. R. Ellis.*
Solicitor for respondents: *C. A. Curwood.*

W. P.

1882
June 10.

BOBBETT *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Railway—Lands Clauses Act, 1845 (8 *Vict. c.* 18, *s.* 127)—*Land required for Purpose of Undertaking — Adverse Possession — Statutes of Limitations*, 3 *& 4 Wm.* 4, *c.* 27, *s.* 7; 37 *& 38 Vict. c.* 57, *s.* 1—*Evidence.*

The mere fact that land of a railway company is required for the purposes of their undertaking, and is not superfluous land, does not prevent an occupier who has exclusive adverse possession for twelve years becoming thereby entitled to the land under the Statutes of Limitations.

FURTHER CONSIDERATION.

Action of trespass and to recover possession of land.

W. Willis, Q.C., and *E. B. Stone*, for the plaintiffs.
E. Clarke, Q.C., *A. Tufton*, and *W. Garth*, for the defendants.

The facts and arguments appear in the following judgment of

DENMAN, J. This action was brought to recover possession of a piece of land near the Frant Station on the defendants' line. The land in question was about 100 yards from the station door, inside a line of fence which divided the company's land from the high road. It was on a level with the line and within a few feet of a siding of the company. In the year 1863 the land in dispute had been for some years used as a coal wharf by one Beale, who carried on his business there as a coal merchant, receiving coal from the company's trucks and delivering it to customers from the wharf into carts standing on the highway. In 1863 Beale retired, and the plaintiff purchased his business. The plaintiff then applied to Noden, the defendants' manager, for "permission to occupy" the coal wharf in the place of Beale; and Noden wrote that he would give instructions to the station-master "to allow the plaintiff to take possession of the wharf," and wrote a letter to the station-master to that effect. Thereupon the plaintiff, after communicating with the station-master, but without any lease or agreement, proceeded to use the coal wharf, and a small wooden shed adjoining used by Beale as an office, for the purposes of his business. In 1865 the plaintiff erected a brick office in the place of the wooden shed above mentioned. Down

to 1881 the plaintiff carried on the business there. The company's servants occasionally repaired a fence which was between the coal wharf and the siding. No permission was ever given by the plaintiff to the company's servants to repair this fence; but it was occasionally repaired by them at his request, and sometimes he gave a gratuity to the company's servants who had repaired it. No rent was ever agreed upon, or paid, or contemplated for the plaintiff's use of the land. The usual access to the coal wharf was through the gate which led from the high-road to the station and across the station-yard. This gate was kept closed at night by the company, but not locked. There was also a mode of entering the coal wharf from the high-road through some openings at the back of the coal wharf abutting upon the high-road, through which coal was unloaded into carts standing in the high-road, and the plaintiff occasionally entered by those openings. A siding of the company came up close to the fence which separated the coal wharf from the rest of the company's land. This fence was put up by the company to prevent the coals from falling upon the metals of the siding. The engineer of the company proved that the land in dispute was not superfluous land, and in fact it was required in 1881 for an additional siding. On the 14th of April, 1881, the defendants gave the plaintiff a notice in these words: "In order to carry out some necessary alterations, we shall require to take a portion of the wharf *which you now occupy*. Of course, we have no wish to ask you to give up *entire possession*. On the other hand, we ask, of course, that you will willingly meet our views in every way." The plaintiff, on the 18th, answered, saying that he had a large stock of coal on hand, and that he did not know where they were to be put, and added, "Could you arrange for some one to meet me at the station and *decide* where I am to have my wharf." A certain part of the company's premises was pointed out, but the plaintiff being dissatisfied, the company proceeded to make a new siding on the ground in dispute, and the plaintiff brought his action. On the part of the plaintiff it was contended that the plaintiff was a tenant at will from the year 1863, when he first was let into possession, or that he had been in possession to the exclusion of the defendants without any tenancy at all, and that in either case

1882

BOBBETT v. SOUTH EASTERN RAILWAY CO.

the time required by the Statute of Limitations having run, he was absolutely entitled to the land when ousted by the defendants. The defendants, on the other hand, contended that no tenancy at all had been created, but that the occupation of the plaintiff was that of a mere licensee, and that, upon the facts, he had never, notwithstanding the language used in 1863, had any exclusive possession of the premises, but merely used them for the purposes of his business in common with the defendants, and for the benefit of both parties. It was also contended for the defendants that even if the plaintiff was a tenant at will from 1863, and in exclusive possession, the Statute of Limitations does not apply to the case, for that the land in question being inalienable by the company, could not, by the mere laches of its officers, have vested in the plaintiff contrary to the intention of the legislature, which it was argued, only allowed the company to take and possess the land for the purposes of the undertaking and subject to the provisions of its Acts, and not to give it up to others. I left to the jury the question whether the plaintiff had since 1864 had possession of the premises to the exclusion of the company. The jury were unable to agree, and were discharged; but, both parties claiming judgment, I reserved the case for further consideration, and having heard it argued, have now to give judgment on the several points discussed. The most important and difficult of these was the question whether the defendants were entitled to judgment on the ground that the Statute of Limitations does not apply to the case of land taken by a railway company not superfluous (for which see *Betts* v. *Great Eastern Ry. Co.* (1)), but actually required for the purposes of its Act.

The argument of the defendants was as follows:—By the 127th section of the Lands Clauses Act, if this land had been superfluous land it would have been the duty of the company to have sold it within ten years of the completion of the works, and, if not sold, it would at the expiration of ten years have become the property of the adjoining owners. But not being superfluous land, no officer of the company could have bound the company by any sale of it. The mere laches of the company's officers could not effect that indirectly which the company had no power to do

(1) 3 Ex. D. 182.

directly, therefore the merely allowing the plaintiff to occupy the land without rent or acknowledgment for twelve years could not give the plaintiff a title.

The argument on the other side was that the case fell within the express words of s. 7 of 3 & 4 Wm. 4, c. 27, and that the plaintiff, having been in possession of the land to the exclusion of the defendants for twelve years, or from 1863 as tenant at will, the defendant's right of entry accrued either in 1863 or at the latest in 1864, which was the expiration of one year from the commencement of the tenancy; and therefore that the defendants were barred by the lapse of twelve years since 1864 at the latest, by the joint effect of 3 & 4 Wm. 4, c. 27, s. 7, and 37 & 38 Vict. c. 57, s. 1, and they cited *Day* v. *Day*. (1)

Several cases were cited bearing upon this question, and it may be useful to refer to one or two which were not cited.

In *Mill* v. *The Commissioner of the New Forest* (2) it was held that under s. 1 of the Prescription Act, 2 & 3 Wm. 4, c. 71, though as against an enjoyment of thirty years it would be unavailing to shew merely the commencement of the enjoyment within legal memory, it would still be competent to shew that the right claimed *could* not have had a legal origin in a grant from the Crown. Jervis, C.J., there says: "The effect of the argument on the part of the claimant is, that you are to get indirectly from the Crown, through the laches of its officers, that which the Crown itself could not confer directly." So here it might be argued that the officers of the company, who had no power legally to dispose of the land acquired and required by the company for the purposes of its undertaking, could not by their mere laches transfer such land to the plaintiff. In the case of *President, &c., of the College of St. Mary Magdalen, Oxford,* v. *The Attorney General* (3) an attempt was made to prevent the operation of the statute, in favour of the Attorney General suing on behalf of a charity, on similar grounds. The case turned upon a different enactment, but the argument was based on similar considerations. It was, however, there held that the object of the statute being obviously to "establish a general rule for the great object of quieting titles, and giving security to long and quiet possession," and the charity having by the laches of the

(1) Law Rep. 3 P. C. 751. (2) 18 C. B. 60. (3) 6 H. L. C. 189.

1882

BOBBETT v. SOUTH EASTERN RAILWAY CO.

trustees lost its claim by lapse of time and non-possession, the Attorney General's right to sue for the charity was also gone. This case again was decided upon a different part of the statute; but it would seem to be inconsistent with the contention that the laches of persons who have no right to alienate may not operate so as to cause the loss of the land even to persons whose rights they are bound to regard and preserve. The case of the *Earl of Abergavenny* v. *Brace* (1) was a very peculiar case. There the majority of the Court, Channell and Cleasby, BB. (diss. Bramwell, B.), held that certain estates tail rendered inalienable by a private statute could not be lost by the operation of 3 & 4 Wm. 4, c. 27, though if they had been ordinary estates tail they would have been barred. The ratio decidendi of that case appears to be contained in the words of Channell, B., in p. 171 of the report. He says that the sections of 3 & 4 Wm. 4, c. 27, relating to estates tail, "seem to shew that it was meant that, wherever a person with the present right to the possession of property could dispose of the estate by his express act, neglect on his part such as would bar his own right should amount to a disposition of the estate, and bar also those who came after him." And he adds, "I do not, however, find any case where this Act enables a man to do indirectly by his neglect anything which he could not do directly by his act. Therefore, although I think that an ordinary tenant in tail would by virtue of the 1st and 2nd sections lose his right after twenty years' want of possession in the time of his ancestor, yet I do not think the present plaintiff, whose estate tail is so exceptional, is in the same position." In that case, however, the judgment proceeded wholly upon the very exceptional provisions of the private Act. Cleasby, B., who agreed with Channell, B., ends his judgment with the observation, "The tenant in tail of the Abergavenny estates may by his conduct create adverse estates binding upon himself, but not, I think, upon his successor." Bramwell, B., differed from the rest of the Court, observing that the one party in such cases loses his title not because the other is *in*, but because he himself is *out* of possession—"not from an 'act' of his, but from want of 'act'—viz. entry or suit." That case proceeded mainly on the ground that there having been no Statute of Limitations at the time of the private Act which would have

(1) Law Rep. 7 Ex. 175.

deprived the remainderman of his right by reason of laches of the tenant in tail, the general Act of 3 & 4 Wm. 4, c. 27 could have no such operation. In *Mayor of Brighton* v. *Guardians of the Poor of Brighton* (1) certain commissioners had been appointed by an Act of 1850, amongst other things, to manage the Pavilion estate. The Act expressly prohibited them from selling without consent of the vestry. In 1853 the guardians of the poor removed into certain buildings forming part of the Pavilion estate, and continued in exclusive occupation of them without payment of rent until 1879, when an action was brought by the corporation (who in 1855 had been substituted by statute for the commissioners) to recover possession. My Brother Lopes, in delivering a judgment in which I agreed, distinguished the case of *Lord Abergavenny* v. *Brace* (2) as follows: "There, the estates were made in the first instance inalienable absolutely: here, an express power is given to sell with the consent of the vestry," and he added, "There are no words in the 19th section" (of the Act of 1850) "which can control the effect of the Statute of Limitations, or can have any reference to the loss of an estate by a want of possession for a length of time." This case appears to me to be an authority in favour of the plaintiff that the statute applies, supposing he has been in exclusive possession for twelve years from 1864.

The only other case on this point which it is necessary to mention is *Norton* v. *London and North Western Ry. Co.* (3) where although it is true that the Lords Justices held that the defendants had lost the land in question as superfluous land which had vested by the statute in the adjoining owner, yet I think it clear that they also held distinctly (though perhaps it was not necessary to the decision of the case) that even assuming it not to have so vested, their title was lost by reason of non-possession for twenty years. Upon consideration of these cases, and others which I have looked into, I have arrived at the conclusion that the mere fact that the property in question was land taken for the purposes of the undertaking and not superfluous land, would not prevent the plaintiff if he had exclusive possession since 1863, either as a wrongdoer or as tenant at will in the first instance, from being entitled to the land by virtue of the Statute of Limitations.

(1) 5 C. P. D. 368. (2) Law Rep. 7 Ex. 175, 45 (3) 13 Ch. D. 268.

1882

BOBBETT v. SOUTH EASTERN RAILWAY CO.

This brings me to the question whether upon the undisputed facts proved at the trial and set forth above, I ought to give judgment for either party under Order XL., Rule 10. When that question arises I understand the proper test to apply is to consider whether there is evidence such as if left to the jury would warrant them in finding a verdict for the plaintiff, which the Court would not be clearly bound to set aside as wholly unreasonable. If there be such evidence there ought to be a new trial, if not, in the absence of any ground for thinking that further light could be thrown upon the matter by a new trial, judgment ought to be entered for the defendant. Applying this test to the present case, I am of opinion that I ought to enter judgment for the defendants. In coming to this conclusion I am much influenced by the position of the land as shewn in the plans and described in the evidence. It was so immediately adjoining the station, and so close to the existing siding and line, and was so situated with reference to the boundaries of the company's premises, that it was in the last degree improbable that the company should have intended to put the plaintiff into sole and uncontrolled possession. No rent was agreed upon, or paid, or apparently ever thought of. The usual access to the premises was through the gates of the station yard, and along the company's land. The use of the words "to take possession," by the company's manager in 1863, and "the wharf which you now occupy," in the letter of the 14th of April, 1881, which was strongly relied upon by the plaintiff's counsel, was, in my opinion, far more than counterbalanced by the plaintiff's own request on the 18th of April, 1881, "could you arrange for some one to meet me at the station and *decide* where I am to have my wharf." On the whole I am of opinion that there was no reasonable evidence upon which a jury could have found that the defendants had been out of possession since 1863 or 1864, by reason of any exclusive possession or tenancy of the plaintiff. The coal wharf in question appears to have been very similar in its mode of occupation to the property described in the case of *London and North Western Ry. Co.* v. *Buckmaster*. (1)

There the question was whether the railway company or certain coal-owners who occupied certain stables within the fence and gates of the station were liable to be rated. The Exchequer

(1) Law Rep. 10 Q. B. 444.

Chamber were equally divided, and the decision of the Queen's Bench was affirmed on the ground that under the circumstances of that case, though a certain monthly payment was there made for the use of the stables, the coal-owners were, from the nature of the property, to be considered as licensees. I took a different view in that case, but affirming as it did the decision of the Queen's Bench, I should regard it as a binding authority if it were exactly in point. But in truth I think the facts of the present case are far stronger in support of the same view. The only fact indeed, beyond the mere use of inaccurate terms, which seems to me at all cogent in support of an exclusive occupation by the plaintiff, is the erection of the brick office at one end of the wharf in 1865. But the substitution of this office for the wooden one left by Beale was certainly not stronger evidence in support of such exclusive occupation and of a tenancy at will than was the payment of a monthly rent by the coal-owners in *London and North Western Ry. Co.* v. *Buckmaster*. (1) I think, indeed, that the office must be looked upon as a mere accessory to the coal wharf for the purpose of enabling the plaintiff to carry on the business which was carried on for the mutual accommodation of the plaintiff and the company. For these reasons I am of opinion that if the jury had found a verdict for the plaintiff, on the question I left to them, or if it had been left to them to say whether the plaintiff occupied in 1864 or since as tenant or as mere licensee, and they had answered that he occupied as tenant, such verdict could not have been allowed to stand as being wholly unreasonable and unsupported by the evidence; and therefore that there ought to be judgment for the defendants under Order XL., Rule 10. I give judgment for the defendants accordingly with costs. (2)

Judgment for the defendants with costs.

Solicitors for plaintiff: *Collyer-Bristow, Withers, & Russell.*
Solicitor for defendants: *W. R. Stevens.*

(1) Law Rep. 10 Q. B. 444.

(2) June 10, 1882. This decision was affirmed by the Court of Appeal (Jessel, M.R., Lindley, and Bowen, L.JJ.), on the question of evidence. The point of law was not raised. Law Reports W. N. 17 June, 1882, p. 92.

J. R.

1882
May 13.

MOSTYN *v.* STOCK.

Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 7), *s.* 87—*Execution levied for a Sum, with Possession Money, above* 50*l.*—*Reduced by payment on account—Bankruptcy—Payment of Balance by Trustee.*

After seizure under a fi. fa. for a sum which was increased by possession money to an amount above 50*l.*, payments on account were made by the execution debtor, reducing the amount below 50*l.* The execution creditor knew and approved of such payments, and authorized the sheriff to give the execution debtor further time to pay the balance, so that a sale might be avoided.

Proceedings in bankruptcy having been taken against the execution debtor, his trustee paid the balance to the sheriff, who gave possession of the goods to the trustee:—

Held, that the execution creditor was entitled to the balance, as the proceeds of an execution for a sum not exceeding 50*l.*

FURTHER CONSIDERATION.

At the trial of an interpleader issue, before Lopes, J., the facts were agreed upon, and the question of law arising out of them was left to the decision of the learned judge.

Forbes, Q.C., and *Arthur Edwards*, for the plaintiff.
H. Matthews, Q.C., and *A. Young*, for the defendant.

May 13, 1882. LOPES, J. The question raised is whether the plaintiff, the trustee in liquidation, or the defendant, the execution creditor, is entitled to 37*l.* 18*s.* 2*d.*, paid into court.

The facts are agreed upon, and, so far as material, are as follows: On the 3rd of November, 1881, the execution debtor paid the sheriff on account 5*l.*, at which time and before such payment the amount for which the goods were liable was, with the possession money, a sum exceeding 50*l.* On the 4th of November, 1881, the execution debtor paid the sheriff a further sum of 10*l.* on account. The execution creditor's solicitors knew and approved of such payments, they authorized the sheriff to give the execution debtor further time to pay the balance, so that a sale might be avoided. On the 30th of November, 1881, the balance due on the levy, including the possession money, and after deducting the 5*l.* and 10*l.*, was 37*l.* 18*s.* 2*d.*, which was paid by the trustee in bankruptcy to the sheriff, who gave possession

of the goods to the trustee, and which sum has been brought into court to abide the event of this issue.

It is clear on the authorities that if no payments had been made on account by the execution debtor, the case would have been within the 87th section of the Bankruptcy Act, 1869, and the plaintiff would be entitled to the sum in question. I refer to the cases *Ex parte Liverpool Loan Co., In re Bullen* (1); *Ex parte Sims, In re Grubb* (2); *Howes* v. *Young* and *Howes* v. *Stone.* (3) These cases are binding authorities upon me.

The question then is what is the effect of the two payments into court which reduced the debt below 50*l.*?

It has been held that the voluntary abandonment of part of the debt by the execution creditor, after judgment signed and before the levy, avoids the operation of s. 87 of the Bankruptcy Act, 1869: *In re Hinks, Ex parte Berthier.* (4) In the case of *Turner* v. *Bridgett; Wright, Claimant* (5), the Court went further, and held that the execution creditor could, by abandoning so much of his judgment debt as might be necessary to keep the total amount for which the goods were sold under 50*l.*, avoid the operation of the same section of the Act. If the above case is good law the present appears an à fortiori case. The 5*l.* or the 10*l.* were paid bonâ fide, are the property of the execution creditor, and could not be recovered by the trustee. In *Ex parte Sims* (2) it was held that it was the sum for which the goods could be redeemed at the time of the sale that was to be looked at. There was no sale here, but there was that which was tantamount to a sale, I mean the payment by the trustee of the 37*l.* 18*s.* 2*d.* The goods could have been then redeemed for a sum less than 50*l.*, and 37*l.* 18*s.* 2*d.* was all that could have been actually levied by sale. The execution creditor is, therefore, in my judgment entitled to succeed.

Judgment for the defendant.

Solicitor for plaintiff: *Pitman & Son.*

Solicitors for defendant: *Crowder, Anstie, & Vizard.*

(1) Law Rep. 7 Ch. 732.
(2) 5 Ch. D. 375.
(3) 1 Ex. D. 146.
(4) 7 Ch. D. 882.
(5) W. N. 11 March, 1882, p. 34.

J. R.

1882
June 7.

IN RE AN ARBITRATION BETWEEN WALKER & SON, AND BROWN.

Arbitration—Submission—"Costs of Reference"—Award—Costs of Award.

Power, in a submission to arbitration, over the "cost of the reference," includes power to award the costs of the award.

BY written agreement the parties referred all disputes between them to the award of arbitrators, or in case of their not agreeing, to an umpire who should have power "to determine by and to whom the cost of this reference shall be paid or to apportion such cost between the parties."

The submission was made a rule of Court.

The arbitrators disagreeing, the umpire undertook the reference and made his award that, inter alia, Walker & Son do pay to William Henry Brown the costs incurred by Brown, "of and incidental to the reference and award, and the costs of this my award."

A rule having been obtained calling upon Brown to shew cause why the award should not be set aside, on the ground that the umpire exceeded his jurisdiction in awarding to Brown the costs of and incidental to the reference and costs of the award,

Lumley Smith, Q.C., shewed cause. Power to award the cost of the reference includes power to give costs of the award. The words "costs of the award," are indeed generally found in the clause empowering an arbitrator to give costs of the reference, but are unnecessary. No authority requires them to be inserted.

In the converse case, *Galatti* v. *Wakefield* (1), the order of reference provided that the costs of the award should be in the discretion of the arbitrator, and omitted the words "costs of the reference," but an award of the costs of the reference was upheld.

B. Firth, in support of the rule. In every well-drawn submission giving the arbitrator power over the costs, the costs of the award are expressly mentioned. "The costs of the award are the

(1) 4 Ex. D. 249.

amount of the arbitrator's charges, which are usually paid to him when the award is taken up." Russell on Arbitration, 5th ed., p. 364. They are not included in costs of the reference. The umpire could only deal with the costs submitted to him. This is a reference by submission and not by order as in *Galatti* v. *Wakefield.* (1)

FIELD, J. Where the reference is by consent, the umpire has, of course, no greater authority than that given to him by the parties, and it is true that in most submissions to arbitration giving jurisdiction over costs, a power to deal with the costs of the award is expressly conferred. Therefore it is said that in the absence of such express power, the umpire could not rightly give costs of the award. There is no authority in point, but we can easily make one. Common sense suggests that the power over the costs of the reference includes a power to give the costs of the award. If no award was made, the reference would never be finished. I think the rule must be discharged.

CAVE, J., concurred.

Rule discharged.

Solicitors for Brown: *Field, Roscoe, & Co.*
Solicitor for Walker & Son: *W. B. Brook.*

(1) 4 Ex. D. 249.

J. R.

1882

August 8.

EX PARTE STRINGER.

Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35, *Sched.* 1, *Table A., clause* 10—*Refusal to Register Transfer—Company's Lien on Shares.*

Table A in the 1st schedule to the Companies Act, 1862, contains regulations which may be adopted for the management of a company limited by shares. The 10th clause of the Table provides that "the company may decline to register any transfer of shares made by a member who is indebted to them":—

Held, that this provision is not limited to cases where the member is indebted for calls or otherwise in respect of the particular share proposed to be transferred, but enables the company to decline to register the transfer if the member is indebted to them on any account whatever.

APPEAL from the decision of Denman, J., at chambers, refusing an application under the Companies Act, 1862, s. 35, for rectification of the register of shareholders of the Tablet Advertising Company, Limited.

The company, which was registered under the Companies Act, 1862, had adopted the regulations contained in the 1st Schedule to the Act, Table A. A transfer of shares in the company having been made by a shareholder, the company refused to register the transfer on the ground that the transferor was indebted to the company for money advanced by the company to him. Upon such refusal the transferee of the shares applied to Denman, J., at chambers, under the 35th section of the Companies Act, 1862, for an order that the register might be rectified by entering thereon the name of the transferee as holder of the shares transferred.

The company resisted that application upon affidavits alleging debts due to them from the transferor of the shares which remained unsatisfied. These alleged debts were not for calls in respect of the shares or in any way connected with the shares, but it was alleged that monies had been advanced to the transferor by the company for certain purposes in connection with the company's business, and not having been applied to such purposes were repayable to the company by the transferor. The learned judge dismissed the application. Against this decision

Woodard, for the applicant, moved, by way of appeal. The

10th clause of the Table A provides that "the company may decline to register any transfer of shares made by a member who is indebted to them." But the reasonable construction of that provision is that it refers only to calls or other sums due in respect of the particular shares proposed to be transferred. It cannot be intended that the company should have a general lien for any debt upon the member's shares.

[He cited *Hubbersty* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1); *In re Stockton Malleable Iron Company* (2); Lindley on Partnership, 4th ed. vol. i. 703.]

McIntyre, for the company, was stopped by the Court.

Lord Coleridge, C.J. I am of opinion that we ought not to make the order applied for. By the terms of the 35th section, the exercise of the power thereby given is expressly made discretionary, for the Court may refuse the application with or without costs, or may make the order. The question therefore whether the application should be granted or refused must depend on the justice of the case. In the present case, the company has adopted a schedule of regulations which forms part of the Companies Act, 1862. In that schedule there are two clauses which seem material. By the 10th clause "the company may decline to register any transfer of shares made by a member who is indebted to them." By the 75th clause, "the directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise." There was a contract for the transfer to the applicant of these shares by the holder, but the company declined to register the transfer. Thereupon the transferee applies to us to rectify the register, and compel the company to register the transfer under the discretionary power given to us by the 35th section. The company alleges that we ought not to do so, because the transferor of the shares owes them money, and therefore they are not bound to register the transfer, and because under the rules they have a right to deduct from any dividends on the shares the amount of their debt. Inasmuch as the Court has a discretion, the applicant must satisfy the Court that the

(1) Law Rep. 2 Q. B. 59, 471. (2) 2 Ch. D. 101.

1882

EX PARTE STRINGER.

justice of the case requires that they should make the order. I am not satisfied, on the case as presented to us, that the company have not a just claim against the transferor. If that be so, the question arises, what is the true meaning of the 10th clause of Table A in the schedule. It is argued that it must be limited to cases where debts are due to the company in respect of the shares proposed to be transferred. The answer is that the words are general and contain no such qualification, and further that the 75th clause shews very good reason why they should not contain any such qualification.

We were pressed with decisions supposed to be in favour of the applicant's contention. I pointed out during the argument that the ratio decidendi in the case of *Hubbersty* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), was not that it was necessary in order to give a reasonable meaning to the section there in question to read into it words so as to modify its natural meaning, but that the true construction of the words actually used in it was that they referred only to shares in respect of which calls had been made and still remained due. Without saying that I should have arrived at the same conclusion, it is enough to say that a very strong body of judges did arrive at that conclusion, and that it is binding upon us as an authority, but in the present case no such words exist as those the construction of which was then in question. There are no words capable of raising the argument that arose in that case. The words of the clause we have to construe are perfectly clear. It therefore seems to me that the decision in that case does not apply to the present. The case of *In re Stockton Malleable Iron Co.* (2) is of a similar character. In that case the Master of the Rolls construed certain words which existed in the articles of association as having application only to shares upon which there was a lien in respect of moneys "due and payable." There was no question of inserting words modifying the natural sense of the words actually used. I entirely assent to the conclusion at which he arrived with respect to the construction of those words. The language used by Lindley, L.J., in his book on Partnership, with respect to the decision in *Hubbersty*

(1) Law Rep. 2 Q. B. 59, 471. (2) 2 Ch. D. 101.

v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), seems to shew that he does not consider it applicable to cases where there are words in the statutory enactments relating to the company or their articles of association such as those of the clause now before us.

The judges in that case were deciding upon another Act, and altogether different words. For these reasons I think this appeal must be dismissed.

BRETT, L.J. In this case we must take it that there is a valid contract for the transfer of the shares, but on application to the company they refuse to register the transfer. Thereupon the transferee applies to us under the 35th section to compel the company to register the transfer. The section no doubt gives us a discretion, but I think that, if the argument for the transferee were correct and the only debts included in the 10th clause were debts due on the shares proposed to be transferred, in the present case we could only exercise that discretion in one way. The question, therefore, is whether the argument for the transferee is correct. The company in this case adopted the Table A of the 1st schedule to the Act. The true way of dealing with the case seems to me to be to suppose that the clauses of the table are articles of association of the company, and as such binding on the holder of the shares and the proposed transferee, and to construe them accordingly. The question is whether the 10th clause does in effect, though not in words, give to the company a general lien on the shares for any debt, or merely a lien on the particular share proposed to be transferred for anything due on that share. I confess I had at first considerable hesitation in thinking that the Act meant to give a general lien on the shares for any debt, which seems a somewhat formidable right to give, but we must construe the words used according to the ordinary rules of construction. The argument for the transferee gives a limited construction to the words, but that argument really requires the interpolation of words. The words if construed in their grammatical sense clearly mean "indebted in any way," whereas the transferee's contention involves the insertion of some such words as "in respect of the

(1) Law Rep. 2 Q. B. 471.

1882

EX PARTE STRINGER.

shares proposed to be transferred." On consideration I can see no sufficient reason for inserting those words, or for giving to the words any other than their natural signification in the absence of anything in the remainder of the Act to the contrary. It does not appear to me that the cases which have been cited have any bearing on the present, the decision in the one case being upon an entirely different Act, and in the other upon articles of association containing entirely different language. That being so the transferee's argument fails, and the case is reduced to one of discretion. The transferee appeals against the judge at chambers, who in his discretion refused to order the registration of the transfer. On the affidavits there is at least a doubt whether the transferor is not indebted to the company. Under these circumstances it seems to me that the transferee fails to shew any such case as ought to induce us to overrule the discretion of the judge in refusing to make an order. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for applicant: *Pearce & Sons.*

Solicitors for company: *T. R. Kent, for Owen March.*

E. L.

[IN THE COURT OF APPEAL.]

1882
April 19.

PERCIVAL *v.* HUGHES.

Principal and Agent—Liability of Principal for Act done by Servant of Agent —Adjoining Owners, Liability of—Dangerous or hazardous Work.

The defendant was the owner of a house standing at the corner of two streets, between a house belonging to the plaintiff and a house occupied by B. The defendant being desirous of rebuilding his house employed a competent architect and competent builders to rebuild it. The defendant's new house was a storey higher than the old house, and the basement was lower. After the house had been nearly finished, the workmen employed by the builders began to fix a staircase; in so doing they negligently and without the knowledge of the defendant or his architect, cut into a party wall dividing the defendant's new house and B.'s house. In consequence the defendant's house fell; and the girders having become displaced, injury was done to the plaintiff's house, for which he now sued the defendant. The fixing of the staircase was not in itself a hazardous operation, if it had been carried out with ordinary skill:—

Held (by Baggallay and Brett, L.JJ., Holker, L.J., dissenting), that an action was maintainable against the defendant for the injury done to the plaintiff's house.

Bower v. *Peate* (1 Q. B. D. 321), considered.

Affirmed by H. of L. 8 App. Cas. 443.

ACTION for negligence in taking down two houses standing on the defendant's land and in erecting a new house, whereby the adjoining house of the plaintiff was injured.

The cause came on for trial at Westminster, on the 3rd and 4th of December, 1880, before Manisty, J., and a special jury, when the following facts were in substance detailed by the plaintiff's counsel in his opening address.

The defendant was the owner of a piece of land at the corner of Panton Street and the Haymarket, upon which stood two old houses, Nos. 1 and 2, Panton Street. The plaintiff was the owner of No. 3, Panton Street, which immediately adjoined the defendant's houses on the east side thereof. Between the defendant's houses and the plaintiff's house was a party-wall. On the south side of the defendant's house and immediately adjoining it there stood in the Haymarket a house occupied by one Baron. Between the defendant's houses and Baron's house also was a party-wall, which was stated to be rotten. The defendant being desirous of pulling down his two old houses and rebuilding a new house in

1882

PERCIVAL v. HUGHES.

their stead, employed a competent architect to prepare plans and to superintend the operations, and employed Newman & Mann as builders to execute the work. The old houses were pulled down, and the new house was built upon the defendant's land and nearly finished without injury to the adjoining houses. The party-wall between the defendant's and Baron's houses was taken down as far as the first floor, but it was left standing to the depth of twenty-two feet, and then twenty-five feet of new work was built on the top of what remained of it. The wall was underpinned to a considerable extent. From the old part of the wall an iron girder was placed to support the first floor of the defendant's new house. Some of the girders of the defendant's new house were fixed against the party-wall next the plaintiff's house. When the defendant's house had been nearly finished, it became necessary to fix a staircase, and in order to fix it the workmen of the builders cut into the party-wall between the defendant's house and Baron's house to the depth of a few inches and to the height of about twenty feet, and to the width of about seven feet. The defendant's architect raised some objections to the proceedings of the builders' workmen in cutting away the wall. Very soon afterwards the defendant's house fell; by the fall the party-wall between the plaintiff's house and the defendant's house was dragged over, and the walls of the plaintiff's house were cracked and the house itself was damaged.

This statement of facts not being disputed by the defendant's counsel, without any witnesses having been examined the learned judge stated that there was a primâ facie case of liability against the defendant which required an answer.

The defendant's counsel then proceeded to address the jury. He admitted that the new house of the defendant was to be a storey higher than the old houses; but he stated that the defendant employed Mr. Wimple the architect to prepare plans which were accepted by him; that he entered into a contract with Newman & Mann, the builders, for the execution of these plans; that by the terms of that contract, except to comply with the provisions of some statute, no deviation from those plans was to be committed without the authority of the defendant. The plans shewed that the party-wall between the defendant's two houses

and Baron's house was to be rebuilt. The defendant himself did not personally interfere with the work during its progress, and never authorised any deviation from the plans. But in the course of the work it was agreed between Mr. Wimple and Mr. Wimperis, an architect acting for the owner of Baron's house, that the party-wall between the defendant's old houses and Baron's house should be taken down only as far as the first floor, and that the wall should be underpinned in order to strengthen it, the basement or cellar of the defendant's new house being excavated to a greater depth than the basement of the defendant's old houses. The party-wall was accordingly taken down only as far as the first floor, instead of being wholly removed as provided for in the plans, and it was underpinned in order to give it additional strength. This was done without any signs of weakness, fracture, or settlement appearing in the party-wall. From the first floor the party-wall was newly erected. The work proceeded, girders were placed in the ordinary manner, and the house was roofed in. It became necessary to fix a wooden staircase from the basement, which was not in itself a hazardous operation; but the workmen of the builders, without any knowledge of the foreman of the works or of the defendant's architect, cut into the old part of the party wall next Baron's house; this act was not permitted by the plans or specification, and was wholly unauthorized. Mr. Wimble, the defendant's architect, visited the works, and, seeing the mischief which had been done, ordered it to be made good. Signs of weakness began to appear, and upon the very same night the defendant's house fell, injuring thereby the plaintiff's house in the manner above described.

At the close of the opening address of the defendant's counsel, the learned judge intimated that even if the defendant proved by evidence all that had been alleged upon his behalf, he would have no defence to the action, and he directed the jury to find for the plaintiff, the damages to be agreed upon between the parties, or to be ascertained by an arbitrator.

The defendant obtained in the Queen's Bench Division, a rule to set aside any judgment which might be entered for the plaintiff and to enter it for the defendant, or for a new trial.

The rule came on for argument on the 2nd of June, 1881,

1882

PERCIVAL v. HUGHES.

before Lord Coleridge, C.J., Manisty, and Bowen, JJ., sitting in the Queen's Bench Division.

W. G. Harrison, Q.C., shewed cause.
Philbrick, Q.C., in support of the rule.

Ultimately, on the 21st of December, 1881, the judgment of the Court discharging the rule, was delivered by

BOWEN, J. It appears to us that the learned judge was right in his view of the law. The defendant being bound to do nothing to deprive the plaintiff's house of its support, had employed contractors to execute works which might endanger it. The defendant could not relieve himself of the responsibility arising from such an operation simply by employing competent contractors. It still remained the defendant's duty to see that effectual means were adopted to prevent any damage arising to the plaintiff's premises during the progress of the work, which was likely to be injurious unless sufficient precautions were adopted, and for which he himself had given the order.

It was argued before us that the mischief was caused by a negligent act of commission on the part of the contractors' men, done without orders. But this distinction cannot avail the defendant in the present instance. If the only duty cast upon the defendant had been the negative duty of abstaining from all acts which would damage the plaintiff's premises, it might with reason be argued that an act of commission done by workmen in violation of their instructions rendered neither the contractors, their immediate masters, nor the defendant himself liable. But the duty of the defendant went further. It was to see that at all times during a hazardous operation set in motion by his order effectual support was given to his neighbour's house. This was a positive obligation, not a negative one. He was bound, not merely not to sanction injury but to prevent it; for wilful acts of mischief he might not indeed be responsible, but it was his duty to hinder negligence whether in the shape of acts of omission or commission.

As the defendant has failed to fulfil this duty, the plaintiff is entitled to succeed. The case appears to us to fall within the principle of *Bower* v. *Peate* (1), which must now be taken to have

(1) 1 Q. B. D. 321.

superseded *Butler* v. *Hunter* (1) so far as the cases are in conflict. See *Dalton* v. *Angus.* (2) The rule must accordingly be discharged with costs.

The defendant appealed.

Philbrick, Q.C., and *Douglas Kingsford*, for the defendant. The question is whether the facts of this case fall within the authority of *Bower* v. *Peate* (3); but that case is distinguishable, for the defendant intentionally caused an interference with the plaintiff's right of support.

[HOLKER, L.J. It has long been held that it is no defence to an action for intentionally interfering with a right of support, that the wrongdoer employed a competent contractor.]

In the present case the damage to the plaintiff was the result of an improper mode of executing a piece of work of a harmless description, for the fixing of the staircase was not in itself hazardous; the cause of the injury was an act purely collateral to the main scheme. The staircase was intended by the defendant's architect merely to touch the party-wall. The judgment of the Court below has confounded the work of fixing the staircase with the dangerous operation of pulling down the defendant's two houses. An original contractor is not liable for the negligent acts of a sub-contractor: *Rapson* v. *Cubitt.* (4) In order to make an employer responsible for the act of a contractor, the act causing the injury must be either hazardous in its nature or an invasion of a neighbour's right: *Gayford* v. *Nicholls* (5), decided in 1854. To rebuild a house is an ordinary undertaking in a town, and to give judgment for the plaintiff will do away with the rule exempting an employer from liability for the acts of a contractor and his servants. When a person employs a contractor to do a lawful act, it must be presumed that by the terms of the employment the act was to be done in a lawful manner, and the employer is not responsible for negligence of the contractor in doing the act: *Butler* v. *Hunter.* (1) Where the work to be

(1) 7 H. & N. 826.
(2) 6 App. Cas. 829.
(3) 1 Q. B. D. 321.
(4) 9 M. & W. 710.
(5) 9 Ex. 702.

1882

PERCIVAL v. HUGHES.

done is not of a hazardous character in itself, the employer is not liable for the acts of the contractor unless the latter is employed to do unlawful acts: *Ellis* v. *Sheffield Gas Consumers Co.* (1); or unless the contractor is employed to do something which the employer is bound by statute to do: *Hole* v. *Sittingbourne Ry. Co.* (2)

W. G. Harrison, Q.C. (*R. A. McCall*, with him), for the plaintiff. The defendant undertook to carry out a dangerous operation; and he is liable for the negligent act of the servants of the contractor. It was improper to cut into the party-wall, which probably was in an unsafe condition. Even if the fixing of the staircase was not in itself dangerous, the undertaking of pulling down the defendant's two old houses and of erecting and finishing a new building must be viewed as a whole: *Lemaitre* v. *Davis.* (3)

[PER CURIAM. That case does not help us, because there the acts of the contractor which caused the mischief were done under a contract and a specification.]

Philbrick, Q.C., replied.

BAGGALLAY, L.J. I am of opinion that this appeal must be dismissed. The defendant caused certain works to be undertaken in the neighbourhood of the Haymarket, in order to build a house on ground belonging to him. On the sides of the defendant's new house were party-walls dividing it from the plaintiff's house and also from Baron's. Girders were fixed into the party-walls, and they required proper support, but the foundation was weakened and the girders were let down, and the mischief was thus caused. The work of rebuilding was hazardous from the circumstance that the party-walls required support; they, in turn, supported the houses upon either side. There was some ground for believing that the party-wall next Baron's house was dangerous from age; the defendant's house was a storey higher than the two former houses, and the cellar was re-made, and some underpinning of the walls was necessary. The hazard to the neighbouring houses was very materially increased, and every precaution ought to have been taken. The workmen, however,

(1) 2 E. & B. 767. (2) 6 H. & N. 488.
(3) 19 Ch. D. 281, at p. 292, *per Hall*, V.C.

committed a dangerous act, and the architect in the course of his employment having observed it, directed measures to be taken in order to remedy it. Before the mistake could be remedied, the foundation gave way and a settlement took place, causing the downfall of the defendant's house and injury to the plaintiff's.

I am at a loss to understand how this appeal can succeed. There was an omission on the part of the defendant to fulfil a duty which is imposed upon a building owner; it was his duty to prevent negligent acts, whether of omission or commission. I agree with the judgment of the Queen's Bench Division. A duty was imposed upon the defendant to take care that the girders of his new house did not slip out of their places.

BRETT, L.J. The main question is, was there any duty due from the defendant to the plaintiff, and to answer this question it is necessary to consider the circumstances under which the alleged duty arose. In starting, I may say that the party-wall between the defendant's house and Baron's ought not to have been tampered with; it was the wrongful act of the workmen in cutting into it which caused the mischief. The defendant undertook to pull down two old houses standing on ground belonging to him, and to erect in their place a new building; could he do that without danger of injury to the plaintiff's house? It was in effect admitted that he could not, especially as the new house was to be deeper and higher. The duty was so to do the work of rebuilding as not to injure the adjoining owners. The defendant was bound to take all reasonable means to avert danger. The duty began immediately after he undertook the work, and ended only when the new house was so built up and finished as to be a support to the plaintiff's house. During that time is the defendant liable only for the things which he has done, or at least has ordered to be done? The defendant cannot delegate his duty so as to get rid of his liability. A negligent act was committed in the course of re-building: the workmen of the contractors employed by the defendant tampered with the party-wall so as to cause injury to the plaintiff's house. The negligent act was committed long after the undertaking was commenced, in fact, it was nearly concluded; but the negligent act was committed before the whole intention

1882

PERCIVAL v. HUGHES.

was carried out. The workmen did something which they were not ordered to do; but they did it with the intention of doing work for the benefit of the defendant; the result is the same as if the architect himself had ordered the act to be done; for the wall was tampered with before the whole undertaking was finished. The negligent act was done in order to fix a staircase; and it has been argued that if the workmen of the contractors had been employed merely to fix the staircase, and if they had committed the negligent act in the course of fixing it, the rule laid down in *Bower* v. *Peate* (1) would not have applied, because the work of fixing the staircase is not in itself dangerous, and that on this ground a distinction exists between the present case and *Bower* v. *Peate*. (1) But the original intention of the defendant was to pull down the two old houses and to rebuild a new house in their stead; at the time of the negligent act the whole of the scheme was not finished; the work of fixing the staircase was part of the undertaking, and cannot be separated from it. I think that the defendant is liable, and that the decision of the Queen's Bench Division was right.

HOLKER, L.J. I am unable to agree with the views enunciated by the Lords Justices sitting with me. I think that this appeal ought to be allowed. A great deal will turn upon the meaning of *Bower* v. *Peate*. (1) Before that case was decided, the rule of law was that if a man employed a contractor to do work for him, and if the servants of the contractor by negligence did an injury to a third person, the employer was not liable for the act of the contractor's workmen. *Bower* v. *Peate* (1) established an apparent exception to this general rule; but I think that, even without the aid of that decision, if a man does by a contractor an act which he is bound by statute to do, he cannot shield himself from liability for the improper execution of the work. The principle upon which *Bower* v. *Peate* (1) is founded may be gathered from the judgment of Cockburn, C.J. The question whether *Bower* v. *Peate* (1) was rightly decided arose in *Dalton* v. *Angus* (2); it appears to have been approved of by Lord Selborne, L.C. (3), and Lord

(1) 1 Q. B. D. 321. (2) 6 App. Cas. 740.
(3) 6 App. Cas. 740, at p. 791.

Blackburn. (1) Lord Watson lays down the rule as to liability as follows: "When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done." (2) The doctrine of *Bower* v. *Peate* (3) is sensible enough; it is that if a man contracts for work which is in its nature hazardous, and will probably cause injury to his neighbours, he is bound to see that precautions are taken to prevent injury, and if they are not taken he is liable to compensate his injured neighbour. In the present case, what was the hazard to the plaintiff's house? It is said that it was hazardous to pull down the defendant's two houses and to build a new one. I will admit that the scheme of the work, taken as a whole, was hazardous; but the hazardous part of the operation was to pull down the houses and to excavate to a greater depth; but after that part of the work was done, and properly done, there was nothing to produce danger. After the underpinning of the walls there was no reason to suppose that the remainder of the work would be dangerous. I admit that at all times of doing work known to be hazardous there is a duty on the part of the employer towards his neighbours. If that were the question, I should agree with the other Lords Justices; but in my view the question is, was the particular piece of work productive of hazard upon which the contractors' workmen were engaged at the time of the fall? I admit that if it was, the defendant would be liable; but the workmen were simply ordered to fit the staircase, and it was not to be fitted into the wall. We must take it that at the trial the defendant's counsel was right in his statement of facts, because he was defeated upon his opening; and it is plain that if the workmen had obeyed the order given to

(1) 6 App. Cas. 740, at p. 829. (2) 6 App. Cas. 740, at p. 831.
(3) 1 Q. B. D. 321.

1882

PERCIVAL v. HUGHES.

them they never would have weakened the wall. The point to be considered is that the dangerous work was over, and that the workmen went beyond their instructions. The operation of fixing the staircase was not hazardous, but the workmen thought proper to cut away the wall, and they thereby caused it to collapse. It does seem to me that if the liability of the defendant is to prevail, it will be difficult for any employer to escape from responsibility for the negligence of a contractor. It seems to be admitted that if the fixing of the staircase had been the only piece of work to be done, the defendant could not be liable. Why should he be liable when all the hazardous part of the operations was finished, before the fixing of the staircase was commenced? The wall had been underpinned, and reasonable precautions had been taken. It will be an extraordinary result if the defendant is to be held liable because the fixing of the staircase formed part of a larger undertaking, whilst he would not be liable if it had been the only piece of work to be done. I think that *Bower* v. *Peate* (1) has not been thoroughly understood. In my opinion the appeal ought to be allowed.

Appeal dismissed.

Solicitor for plaintiff: *T. R. Apps.*

Solicitors for defendant: *Hughes, Hooker, Buttanshaw, & Thunder.*

(1) 1 Q. B. D. 321.

J. E. H.

[IN THE COURT OF APPEAL.]

1882
June 17.

BLACKMORE *v.* THE VESTRY OF MILE END OLD TOWN.

Highway—Nuisance—Flap covering a Water-meter in a Street—Improper state of Flap—Liability of Vestry—18 & 19 *Vict. c.* 120, *ss.* 96, 116.

10 QBD 120

A water meter, which was the property of a water company and used for measuring the water supplied by the company to the defendants, the vestry of a parish, for watering the streets, was placed by the defendants in a box of theirs sunk in the footway of one of the streets and covered with an iron flap. The defendants as such vestry were by s. 96 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the surveyors of highways, and by s. 116 authorized to cause the streets in their parish to be watered. The plaintiff whilst walking along the street stepped on the iron flap and, by reason of its having been worn smooth and become slippery and dangerous, he fell and was injured. In an action by him against the defendants for damages for such injury:—

Held, that though the defendants might not be liable as surveyors of the highway for negligence in not keeping the iron flap in a proper state, they were in their capacity as the authority for watering the street, in which capacity they had placed the iron flap there.

White v. *Hindley Local Board* (Law Rep. 10 Q. B. 219) affirmed.

ACTION for damages for an injury, which the plaintiff had sustained by reason of the improper condition of an iron flap placed in a street in a parish, of which the defendants were the vestry. By s. 96 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the vestry within its parish is to execute the office of and be the surveyor of highways (1), and by s. 116 of that Act it is empowered to cause the streets in its parish to be watered. (2)

In order to carry out this power of watering, the defendants, as such vestry, arranged with the East London Water Company for

(1) The 96th section enacts "every vestry and district board shall within their parish or district (exclusively of any other persons whatsoever) execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office under the law for the time being in force, so far as such powers, authorities, duties, and liabilities, are not inconsistent with this Act," &c.

(2) By s. 116: "Every vestry and district board shall have full power and authority to cause all or any of the streets in their parish or district to be watered as often as they think fit, and also to cause any wells to be dug and sunk in such public places as they think proper, and also to erect and fix any pumps in any public places for the gratuitous supply of water to the inhabitants of the parish or district."

1882

BLACKMORE v. VESTRY OF MILE END OLD TOWN.

the supply of water which was to be paid for by meter. The water meter for so measuring the water was furnished by the company, and was enclosed by the defendants in a box of theirs and sunk by them in Charles Street in their parish. Over the box the defendants placed an iron flap on hinges to avoid taking up the paving stones, when the contents of the box had to be used. In course of time the iron flap was worn smooth and became slippery and dangerous, and in consequence of its being in that state the plaintiff who had stepped on it whilst walking in Charles Street during a snowstorm in January, 1881, fell and broke his leg. The plaintiff brought his action for damages in respect of this injury, and at the trial before Grove, J., during the last Easter Middlesex sittings, the jury found a verdict for the plaintiff for 154*l.*

The defendants afterwards obtained a rule nisi for a new trial on the ground of misdirection on the part of the learned judge, in not directing the jury that the defendants, as surveyors of highways and in their public capacity, were not liable for omission to repair the iron flap or for improperly paving the highway.

The Queen's Bench Division having discharged this rule,

The defendants appealed.

Kemp, Q.C., and *Pitt Lewis*, for the defendants. The defendants are, by s. 96 of the Metropolis Management Act, 1855, the surveyors of highways, and as such they sank the box with the meter and the iron flap in the street. They could not have done anything to the highway except in their capacity as such surveyors. The iron flap formed part of the pavement, and was put down by the defendants to cover the hole and so enable passengers to walk over it; it was therefore placed for the purposes of the street, and the duty of the defendants to repair and take care of it was only in their capacity as surveyors of highways: *Rolls* v. *Vestry of St. George's, Southwark* (1), and *Hamilton* v. *Vestry of St. George's, Hanover Square.* (2) As such surveyors, it is clear that the defendants are not liable in this action. The plaintiff relies on the case of *White* v. *Hindley Local Board* (3), but that

(1) 14 Ch. D. 785. (2) Law Rep. 9 Q. B. 42.
(3) Law Rep. 10 Q. B. 219.

case is distinguishable from the present as the grid in that case, which caused the injury, belonged to the defendants as the owners of the sewer of which the grid formed part, and not in their capacity as surveyors of highways.

Waddy, Q.C., and *Crispe*, appeared for the plaintiff, but were not called on.

BRETT, L.J. In my opinion, this case is obviously within the principle contained in *White* v. *Hindley Local Board* (1), and the only question is whether we are prepared to say that that case was wrongly decided. I am of opinion that it was not. No doubt by s. 96, of 18 & 19 Vict. c. 120, the powers and duties of the surveyor of highways are transferred to the vestry, but by s. 116 of that Act, power is given to the vestry to cause the streets in their parish to be watered, and that power is given to the vestry, not as surveyor of the highways, but in the same way as the power of lighting and watering is given sometimes to commissioners. Now, this iron plate was never put down by the vestry in its capacity of surveyor of the highway. It was laid down because the vestry watered the street, and the water which was supplied for that purpose by the water company was paid for by meter, so that the meter was for the protection of the vestry, as well as for the protection of the water company, and therefore the iron plate which covered it was laid down for two purposes, first to protect the meter, and next to protect those using the highway. That is exactly like the grid or grating in *White* v. *Hindley Local Board.* (1) The defendants did not lay this iron plate in their capacity as surveyors of the highway, but in that other capacity of theirs which gave them power to water the streets, and it is in that capacity that they are liable in this action. I think the case of *White* v. *Hindley Local Board* (1), was rightly decided, and that this appeal should be dismissed.

COTTON, L.J. I am of the same opinion. Sect. 116 of 18 & 19 Vict. c. 120, gave the vestry power to water the street, and it is material therefore to consider whether this iron plate was put by the vestry in its capacity as surveyor of the highway, or in its

(1) Law Rep. 10 Q. B. 219.

1882

BLACKMORE v. VESTRY OF MILE END OLD TOWN.

other capacity as the authority for watering the street. It clearly was not put down as a convenient pavement for passengers, but for protecting the water meter, and was laid by the vestry, not in its capacity as surveyor of the highway, but in that of such watering authority, and in that capacity the vestry is liable.

Appeal dismissed.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitors for defendants: *Depree, Austen & Jutsum.*

W. P.

June 10.

THE QUEEN *v.* THE BISHOP OF ST. ALBANS.

Prohibition—The Church Discipline Act, 1840 (3 & 4 *Vict. c.* 86), *ss.* 3, 5, 7, 11, 13, 24—*Proceedings against Clerk in Orders—Bishop Promoter of Suit —Power to adjudicate thereon—Interest—Costs.*

Under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), which empowers a bishop to hear and determine a charge against a clerk in orders of having committed an ecclesiastical offence, if the bishop be not patron of any preferment held by the party accused, the mere fact that the bishop is, by his secretary, promoter of the suit does not, in the absence of any personal interest or bias, disqualify him from adjudicating upon the case.

RULE calling on the Bishop of St. Albans and Arthur James Day, the secretary to the bishop, to shew cause why a writ of prohibition should not issue directed to them to prohibit them from further proceeding in the matter of a certain cause or proceeding promoted by the said Arthur James Day under the provisions of the statute 3 & 4 Vict. c. 86, entitled an Act for better enforcing Church Discipline, against a vicar of a vicarage and chapelries in the diocese of St. Albans.

A complaint having been made against the vicar by a person who would not take upon himself the prosecution, the bishop directed his secretary, to act as promoter, and on the application of the secretary, issued a commission under 3 & 4 Vict. c. 86 (the Church Discipline Act), addressed to commissioners to inquire into allegations against the vicar; the commissioners held an inquiry, heard evidence, and reported to the bishop that there was primâ facie ground for instituting further proceedings against the vicar, and he was served with a citation and articles.

The citation, under the hand of the bishop, required the vicar either in person or by his agent to appear before the bishop at a certain place within the diocese on a certain day. The articles were promoted by the secretary of the bishop. Default being made in answer, the bishop was about to proceed to hear and determine the case with assessors, whereupon the rule was moved. (1)

A. Wills, Q.C., and *Jeune*, shewed cause. The Church Discipline Act, 3 & 4 Vict. c. 86, makes the bishop the mover of the proceedings and judge of the case. His secretary is the right person to move as promoter of the suit. The commissioners have reported that there is sufficient primâ facie ground for instituting proceedings, and the bishop "thinks fit to proceed," articles have been drawn up and filed in the registry: 3 & 4 Vict. c. 86, s. 7, and the case can be regularly heard by him and determined by him: ss. 9, 11. He has no personal interest or bias which disqualifies him from acting as judge. Sect. 13 certainly enables the bishop "in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient ground for instituting proceedings, and before the

(1) By 3 & 4 Vict. c. 86, s. 7, If the commissioners shall report that there is sufficient primâ facie ground for instituting proceedings, and if the bishop of the diocese shall thereupon think fit to proceed against the party accused, articles shall be drawn up and filed. By s. 8 the articles shall be served upon the party accused. By s. 9 it shall be lawful for the bishop to require the party to appear before him. By s. 11 the bishop shall proceed to hear the cause, with the assistance of assessors, and "upon the hearing of such cause the bishop shall determine the same and pronounce sentence thereupon according to ecclesiastical law."

Sect. 13 provides that it shall be lawful for the bishop in any case, "if he shall think fit, either in the first instance or after the commissioners have reported that there is sufficient primâ facie ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case, by letters of request, to the court of appeal of the province, to be there heard and determined . . ."

By s. 24, "When any act, save sending a case by letters of request to the court of appeal of the province, is to be done or any authority is to be exercised by a bishop under this Act, such act shall be done or authority exercised by the archbishop of the province in all cases where the bishop, who would otherwise do the act or exercise the authority, is the patron of any preferment held by the party accused."

1882

THE QUEEN v. BISHOP OF ST. ALBANS.

filing of the articles, but not afterwards," to send the case to the court of appeal of the province. But here articles have been filed.

[FIELD, J. Can the bishop, by his adjudication, give costs?]

It is doubtful. He is to "hear the cause," and "shall determine the same and pronounce sentence thereupon according to the ecclesiastical law:" s. 11. If he cannot give costs he has no interest in the proceedings, and even if he can give costs the statute enables him to adjudicate notwithstanding.

A. Charles, Q.C., and *Willis Bund*, in support of the rule. The secretary asks for costs, but it is doubtful whether the bishop can give them. The question is whether, when the bishop proceeds ex mero motu, or by his secretary, he can hear the cause. By s. 7, after the report of a primâ facie case the bishop may think fit to proceed, whereupon articles shall be drawn up and filed under s. 7, or he may send the case by letters of request to the court of appeal of the province under s. 13. Where another party is promoting the suit the bishop may adopt either mode, but when he himself is promoter he should not adjudicate upon the case, but must transmit it to the court of appeal. It is not necessary that he should act, and therefore he must not act as judge of a case in which he has an interest. His interest in the costs is sufficient to disqualify him: *Ex parte Medwin.* (1) In an *Anonymous Case* (2) the Mayor of Hereford, although by charter sole judge of a court, was said to have been imprisoned for entertaining in it a cause in which he was interested.

FIELD, J. The rule must be discharged. The question is whether the prohibition should go to the bishop because he is disqualified by interest from hearing the case.

There is no suggestion of any personal interest, nor of any actual bias disqualifying him. The bishop, in the exercise of his duty as pastor of the diocese, thinks it right to proceed on the report of the commission. If he is to be restrained, it can only be on the general principle of law that a judge shall not be judge of his own cause. The principle is of the highest importance. But

(1) 1 E. & B. 609. (2) 1 Salk. 295.

there is no doubt also that for public convenience, and for the sake of justice at large, there are some cases where a man may be judge in his own cause: as in case of necessity, for example, when a judge commits to prison for contempt of his Court. The law deems this necessary for the administration of justice. The legislature itself has directly interposed in some cases, and declared that justices, although ratepayers, may hear rating appeals, the effect of which may be to reduce their own contribution to the rate. Therefore, exceptions to the general rule are not unknown to the law. We must have regard to the Act of Parliament and to the nature of the tribunal to see if the legislature has intended the bishop to be judge in such a case as the present. The legislature has for high and wise purposes, and in the best interests of the church, and for the discipline of the clergy, created an entirely new system of procedure. To prevent great scandal and the expense of the proceedings of a harassing kind which were formerly taken in the case of a clerk charged with an ecclesiastical offence, it was thought right to give to the bishop a power, in his discretion, to issue a commission. This he might do in two events, viz., first, on a scandal coming to his ears; secondly, on some person complaining. In this case a commission issued and a report was obtained. That being so, it is important to see what the next proceedings are. The report being obtained, neither party may think proper to go any further. The party complaining may not find the case so grave as he at first thought, and be disinclined to proceed. But if the bishop shall think fit to proceed, what is the next step? Sect. 7 says articles shall be drawn up, and shall be filed. When they are filed, the case cannot follow any other course than to come before the bishop and his assessors, and no doubt it was the intention of the legislature that the bishop should be the person who might proceed and hear the case. But here, it is said, that he requested his secretary to act as promoter. I fail, however, to see how that alters the case if the bishop himself had power to do it. Mr. Charles relies on s. 13. There, no doubt, an alternative course is given, and if I could see on the face of the Act that it was the intention that, in all cases where the bishop was interested, the case should be sent to the court of the province, I should come to the conclusion

1882

THE QUEEN v. BISHOP OF ST. ALBANS.

Field, J.

that the legislature did not intend that the bishop should be judge in his own cause. But such is not the language nor spirit of the clause. The language is, that "before the filing of the articles, but not afterwards," the bishop may send the case to the court of appeal of the province. In order that the alternative shall apply, the transmission must be either in the first instance, or after the report of the commissioners and before the filing of articles. I think that s. 13 is not directed to interest but to the nature and character of the offence. It is to be observed that the legislature had the question of interest before it, for in s. 24 there is a case of personal interest supposed and provided for, viz., where the bishop is the patron of any preferment held by the party accused, in which case the archbishop is to act instead of the bishop.

Fully desiring to uphold the general principle of law that a judge shall not be judge in his own cause, I think there is, at the present stage, no objection to the proceeding sought to be prohibited, and that the bishop must proceed and must hear the case. The learned counsel on both sides doubt as to whether costs can be given. Perhaps the bishop may hereafter be held entitled to give himself costs by his own judgment. It is very difficult to say whether he has power to give them. This point may be met hereafter when there is an attempt to give costs. But until the tribunal is clearly exceeding its jurisdiction, we do not grant prohibition.

CAVE, J. The complaint is that the bishop is promoter of the suit and in that way has an interest in it, and is also the judge. This is a good objection, unless some statute enables him to sit as judge. To shew that there is, Mr. Wills cites the Church Discipline Act, 1840, s. 7. That undoubtedly must be read with s. 13. Reading the two together they seem to provide that if the commissioners report a primâ facie case, and the bishop thinks fit to proceed, articles shall be drawn up, *or* if the bishop thinks fit the proceedings may be sent to the court of the province. Mr. Charles reads it that if a primâ facie case is reported, and the bishop thinks fit to proceed, articles shall not be drawn up, but the case shall be sent to the court of the province. In my opinion the bishop, if he thinks fit, may proceed to hear the cause

although promoter. If any real bias could be shewn, the clerk would be entitled to apply to us for prohibition: *Reg.* v. *Handsley.* (1)

Rule discharged.

Solicitor for applicant: *Hetley.*

Solicitors for respondents: *Tebbs & Sons.*

J. R.

CAPELL *v.* THE GREAT WESTERN RAILWAY COMPANY. *July* 8.

Lands Clauses Consolidation Acts, 1845, 1869 (8 *Vict. c.* 81, *ss.* 34, 53; 32 *& 33 Vict. c.* 18)—*Settlement of Purchase-money by Arbitration—Costs of Arbitration—Payment due before Conveyance.*

Where the amount of compensation payable to the owner of lands taken under the Lands Clauses Acts, 1845 and 1869, is settled by arbitration, and the amount and the costs of the arbitration are awarded to the owner, the taxed costs of the arbitration become payable to him within a reasonable time, and the execution of the conveyance by him of the lands taken is not a condition precedent to payment of such costs.

23 Ch D 29

Affirmed on appeal 10 Q.B.D. 345 C.A.

FURTHER CONSIDERATION.

Statement of claim:

By the Bristol and Exeter Railway Act, 1875 (38 & 39 Vict. c. cxxvii.), the Bristol and Exeter Railway Company were authorized to make and construct a railway in the county of Somerset to the town of Weston-super-Mare. By s. 2 of the Act the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, and the Railways Clauses Consolidation Act, 1845, and other Acts were incorporated with and form part of the Bristol and Exeter Railway Act, 1875.

By the Great Western and Bristol and Exeter Railway Companies' Amalgamation Act of 1876 (39 & 40 Vict. c. lxxiv.), the Bristol and Exeter Railway Company and the Great Western Railway Company were amalgamated as from the 1st of August, 1876.

5. On or about the 24th of April, 1876, notice was, under the Bristol and Exeter Railway Company's Act of 1876, given by the Bristol and Exeter Railway Company to the plaintiff, being the owner and in possession of and enabled to sell or convey or release certain land, to treat for the purchase thereof; and on or about

(1) 8 Q. B. D. 383.

1882

CAPELL v. GREAT WESTERN RAILWAY CO.

the 9th of October, 1876, the defendants offered to the plaintiff the sum of 1700*l.* for the purchase of the said land, which offer was refused by the plaintiff.

6. On the 19th of December, 1876, the amount of compensation payable by the defendants to the plaintiff was settled by arbitration under the provisions of the Lands Clauses Consolidation Acts, 1845 and 1869, and the sum of 1750*l.* and the costs of the arbitration were awarded to the plaintiff.

7. On the 5th of August, 1881, the costs of and incidental to the arbitration and award were according to the provisions of the 1st section of the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), taxed and settled as between the plaintiff and the defendants, and on that day the taxing-master gave his allocatur for 177*l.* 12*s.* 6*d.*, the amount of such taxed costs.

8. The defendants approved of and accepted the plaintiff's title in the land so taken and purchased by them as aforesaid, and on or about the 15th of October, 1881, the defendants agreed with the plaintiff to take possession and to finally settle the purchase within one month of the 15th of October, 1881.

9. The plaintiff did all things necessary to entitle him to payment by the defendants of the costs of and incidental to the award and arbitration, and demanded payment of the same of the defendants, but they had not paid the said costs or any part thereof, and the sum of 177*l.* 12*s.* 6*d.* remained due and payable by the defendants to the plaintiff in respect thereof.

Defence (inter alia), that at the commencement of the action the necessary conveyances of the plaintiff's land and interest had not been approved or executed, and that, since action brought, the conveyance had been executed and the defendants had paid the purchase-money, and all costs, except the costs of the arbitration, which had been tendered but refused.

Reply: Issue.

March 17. *A. Charles, Q.C.*, and *Bucknill*, for the plaintiff.
H. Matthews, Q.C., and *R. S. Wright*, for the defendants.

July 8. LOPES, J., after reading paragraphs 5, 6, 7, and 8 of the statement of claim, proceeded to give judgment,—

The plaintiff's title was accepted and approved by the defend-

1882

CAPELL v. GREAT WESTERN RAILWAY CO.

ants *before* the commencement of the action. Since the commencement of the action the conveyance has been executed, and the defendants have paid to the plaintiff the entire purchase-money and all costs of conveyance and otherwise incidental to the purchasing and taking the plaintiff's land except the costs of the arbitration.

The case comes before me without a jury; and it was agreed that the correspondence and documentary evidence should be regarded as put in, and proceedings be stayed in three other similar actions until judgment given in this, such actions to be governed by the decision in this action.

The question raised is whether the taxed costs of the arbitration became payable before or after the execution of the conveyance by the owner of the land to the company; in other words, whether the execution of the conveyance is a condition precedent to payment of taxed costs.

The plaintiff contends that they are a distinct and separate matter, and become payable within a reasonable time after taxation, or at any rate after the title of the claimant is accepted and approved by the defendants. The defendants contend that the costs of an arbitration are ancillary to the payment of the purchase-money, and are not payable until the purchase-money is payable, and, inasmuch as the purchase-money is not payable until the conveyance is executed, neither are the costs of the arbitration.

It is clear that the amount of compensation money to be paid for land compulsorily taken, although fixed by an award under the Lands Clauses Consolidation Act, 1845, is not recoverable until a conveyance of the land has been executed: *Guardians of East London Union* v. *Metropolitan Ry. Co.* (1), not when merely a good title has been shewn: *Howell* v. *Metropolitan District Ry. Co.* (2) There is no authority, however, to shew that costs stand on the same footing as the purchase-money. *Earl Ferrers* v. *Stafford and Uttoxeter Ry. Co.* (3) is an authority shewing that there is a distinction between them.

Todd v. *Metropolitan District Ry. Co.* (4) was relied upon as

(1) Law Rep. 4 Ex. 309.
(2) 19 Ch. D. 508.
(3) Law Rep. 13 Eq. 524.
(4) 24 L. T. 435.

1882

CAPELL v. GREAT WESTERN RAILWAY CO.

shewing that the costs of the inquiry for ascertaining compensation only become payable on the existence of a well-founded claim; and it was urged that it would be very unfair for the promoters to be compelled to pay the costs of an arbitration before conveyance, when it might turn out that the claimant had no title at all.

I think these cases only refer to well-founded claims before the arbitrator. The title in all inquiries under the Lands Clauses Consolidation Act is assumed, and all that has to be ascertained is the value of that which the company seek to acquire. The cases last named are authorities to shew that where there is no claim there should be no costs. If a claimant goes to an arbitration or to a compensation jury with no right to do so, he cannot have his costs; and these cases do not assist the defendants' contention that the costs of the arbitration are not payable until the conveyance is executed, because they might have to pay costs to a person who, they found out afterwards, had no title.

There is no authority which really touches the point raised in this case. It is necessary to consider carefully the words of s. 34 and s. 53 of the Lands Clauses Consolidation Act, 1845, which relate to costs. There is nothing in s. 34 favouring the contention that the costs are to be postponed until conveyance. The natural reading of the section leads to another conclusion. There are many inconveniences which might be suggested if the payment of these costs is to be postponed until the conveyance. The conveyance might not be executed for a long time. Again, when you look at ss. 51, 52, and 53, with regard to the costs of an inquiry with a jury, great inconvenience would arise if these costs were not payable until after the conveyance. The summary and easy mode of enforcing payment provided for by s. 53 would be unintelligible.

It was urged that, if the costs become payable before the conveyance was executed, and the claimant eventually failed to make out a title, the promoters might be harassed by a second inquiry, and be burdened with a second set of costs, without any power of recovering back what they had fruitlessly paid. I was at first impressed with this argument; but I think a case of

1882

CAPELL v. GREAT WESTERN RAILWAY CO.

the kind suggested is provided for by s. 76 of the Lands Clauses Consolidation Act, and a course indicated for the promoters to follow which would entirely obviate the suggested difficulty.

I think the plaintiff's costs became payable within a reasonable time after taxation, and that the plaintiff is entitled to recover them in this action. There will be judgment for the plaintiff for 177*l.* 12*s.* 6*d.*, and interest from the date of the writ, with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Mead & Daubeny.*
Solicitor for defendants: *R. R. Nelson.*

J. R.

[IN THE COURT OF APPEAL.]

July 1.

CORY & SONS *v.* BURR.

Insurance, Marine—Policy—Construction—Perils insured—Barratry—Warranty "free from Capture and Seizure"—Whether Barratry causing Capture within Warranty.

In a time policy of marine insurance the ordinary perils insured against (including "barratry of the master") were enumerated, and the subject-matter of the insurance was warranted "free from capture and seizure." During the continuance of the policy in consequence of the barratrous act of the master, the ship was seized and detained for smuggling. In an action on the policy to recover expenses incurred by the owner in obtaining the release of the ship:—

Held, affirming the judgment of the Queen's Bench Division, that the underwriter was not liable, as the warranty applied to capture or seizure from whatever cause, and therefore to seizure which was the result of barratry.

Affirmed by H.L. 8 App Cas 393 H.L.

APPEAL by the plaintiffs from the judgment of the Queen's Bench Division on a special case. (1)

The plaintiffs, who were the owners of the steamship *Rosslyn*, effected a policy of marine insurance on her for twelve calendar months, from the 29th of May, 1878, which was underwritten by the defendant, an underwriter at Lloyd's. The risks and losses insured against were those usually covered by a marine policy, and included perils of the sea, men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings, princes and

(1) 8 Q. B. D. 313.

1882

CORY v. BURR.

people of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the said subject-matters of insurance, or any part thereof. The policy contained the usual sue and labour clause, and the subject-matter of insurance was warranted "free from capture and seizure and the consequences of any attempt thereat."

On the 23rd of May, 1879, whilst the vessel was covered by the policy, the master took on board a cargo of tobacco for the purpose of its being smuggled into Spain, and he did so for his own benefit and against the expressed instructions of the plaintiffs, and it was found in the special case, if it were a question of fact, that the conduct of the master was barratrous. In consequence of the tobacco having been so taken on board the ship was seized by the Spanish revenue officers and taken into Cadiz, and the plaintiffs incurred expenses in resisting proceedings for the condemnation of the ship, and were compelled to pay a sum of money in order to procure her restoration. The action was brought to recover the defendant's proportion of such payment and expenses.

The Queen's Bench Division gave judgment for the defendant.

The plaintiffs appealed.

June 8. *Webster, Q.C.*, and *Myburgh, Q.C.*, for the plaintiffs. It must be admitted that if the seizure was within the meaning of the warranty the plaintiffs are not entitled to recover. The warranty must be construed to exclude capture and seizure which is the result of barratry. But for the barratry there would have been no seizure. The loss here was caused by the barratry of the master, which was one of the insured perils, and loss by barratry is an exception to the general rule of causa proxima spectatur: 2 Arnould on Insurance, 5th ed. p. 773. In Parsons on Maritime Law, bk. ii. ch. vii. p. 342, it is said, "If the deviation be barratrous, and the insurers insure against barratry, then the act operates not as a deviation but as barratry. That is the insurers would be liable for a loss caused by it, and would also be liable for a subsequent and independent loss" . . . . "A stipulation that the underwriters shall not be liable for seizure or detention

1882

CORY v. BURR.

on account of illicit or prohibited trade does not render them less responsible for a seizure occasioned by barratry. So also as to a warranty of neutrality," citing the American cases: *American Insurance Co.* v. *Dunham* (1), *Suckley* v. *Delafield* (2), and *Wilcocks* v. *Union Insurance Co.* (3) So in *Havelock* v. *Hancill* (4), where the insurance was on the ship in any lawful trade, and barratry of the master was one of the risks insured against, it was held that the insured was liable for a loss by the barratry of the master by smuggling. Here the seizure was barratrous, it was produced by the barratry, and is therefore not a seizure within the meaning of the warranty: *Vallejo* v. *Wheeler* (5), and *Goldschmidt* v. *Whitmore.* (6) The case of *Livie* v. *Janson* (7), cited in the Court below as being in favour of the defendant does not in fact bear on the question in this case, and Best, C.J., in *Hahn* v. *Corbett* (8) shews that it turned on the distinction between partial and total loss, the question being as said by Lord Ellenborough in *Livie* v. *Janson* (7): "Whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect to the previous partial loss by sea damage?"

Cohen, Q.C., and *J. Gorell Barnes*, for the defendant. The object of the warranty is to exclude the underwriter's liability for what would otherwise have been a risk within the policy for which he would have been liable. This warranty is to free him from liability from capture or seizure, although such should be the consequence of the enumerated perils insured against. There can be no reason why there should be any difference between the perils of enemies and of barratry. The words "capture and seizure" must receive their ordinary meaning, and any seizure of the vessel is within the warranty: *Kleinwort* v. *Shepard.* (9) The loss here, though it might be recovered as a loss by barratry, can also be recovered as a loss by seizure: *Arcangelo* v. *Thomson.* (10) *Heyman* v. *Parish* (11) and *Blyth* v. *Shepherd* (12), also

(1) 12 Wendell N. Y. Rep. 463; 15 Ibid. 9.
(2) 2 Caines, 222.
(3) 2 Binney, 574.
(4) 3 T. R. 277.
(5) 1 Cowp. 143.
(6) 3 Taunt. 508.
(7) 12 East, 648.
(8) 2 Bing. 205, at p. 211.
(9) 1 E. & E. 447; 28 L. J. (Q.B.) 147.
(10) 2 Camp. 620.
(11) 2 Camp. 149.
(12) 9 M. & W. 763.

1882

CORY v. BURR.

shew that a loss, which might have been recovered as a barratrous loss, may be treated as a loss by perils of the sea. It would be strange if the warranty could be got rid of by merely changing the form of action. The proximate cause of the loss here was the seizure, and the ordinary rule is to refer only to the proximate cause. Thus where a ship was driven by stress of weather on an enemy's coast, and was there captured, it was held in *Green* v. *Elmslie* (1) to be a loss by capture and not by perils of the sea. Capture and seizure might be brought about by some of the enumerated perils insured against, and the warranty was intended to cut down the liability of the underwriter in respect of any such enumerated perils as should end in capture and seizure; but the plaintiffs wish to write into the warranty this exception, viz., seizure and capture brought about by barratry. The *American Insurance Co.* v. *Dunham* (2) turned solely on *Havelock* v. *Hancill* (3), and that last case was decided on the ground that the Court construed "lawful trade" in the policy to mean the trade in which the ship is sent by the owner, so that the owner was not to be liable for any illegal trading by the master without the owner's knowledge. *Wilcocks* v. *Union Insurance Co.* (4) was only a nisi prius decision, and like the *American Insurance Co.* v. *Dunham* (2) only proceeded on the ground of what was the trading insured, and not on the effect of the warranty cutting down any of the perils insured against. *Powell* v. *Hyde* (5) shews that a warranty against seizure is not limited to lawful seizure.

Webster, Q.C., in reply.

Cur. adv. vult.

July 1. BRETT, L.J. This was an action against an underwriter of a policy of insurance on a ship, and was brought to recover money paid by the owners in order to prevent the seizure and condemnation of the vessel, or rather to release her from seizure. The seizure was on the ground that the master had been guilty of smuggling, and it was admitted that such smuggling was an act of barratry. The policy contained a warranty "free

(1) 1 Peake, 278.
(2) 12 Wendell N. Y. Rep. 463; 15 Ibid. 9.
(3) 3 T. R. 277.
(4) 2 Binney, 574.
(5) 5 E. & B. 607; 25 L. J. (Q.B.) 65.

from capture and seizure," and it was urged on the part of the defendant that by reason of that warranty he was relieved from liability, although the seizure was in consequence of one of the perils insured against. On the part of the plaintiffs it was contended that inasmuch as the seizure was the result of the barratrous act of the master, the warranty did not relieve the defendant from his liability for a loss from barratry, as that was a loss he insured against, and reliance was placed on the peculiar doctrine in insurance law that the rule, by which the proximate cause of a loss is alone to be looked to, does not apply to a loss which is the result of barratry, and that as regards such loss the causa causans is to be looked to. It was therefore contended for the plaintiffs that the peril by which the loss in this case was brought about was the barratry of the master, and that the proof of the seizure was not for the purpose of shewing the peril but the loss from barratry by which the shipowner had been affected; in other words, the mode of ascertaining the measure of damage which the plaintiffs had sustained. On the other hand it was contended on behalf of the defendant that there was no damage to the ship-owners here, except by the seizure, and that the terms of the warranty cannot be complied with unless such warranty be applicable to every seizure, whatever may have been the cause of it.

Now, it is true that in this case of loss by barratry the causa causans may be looked at, and that in this case it was the barratrous act of the master. If there had been no warranty against capture and seizure the plaintiffs might have sued for the loss they sued for here, stating it as either a loss by barratry or by seizure. It would have been a loss by barratry although the seizure was the proximate cause of the loss. It might also have been treated as a loss by seizure alone. It is like the case of *Arcangelo* v. *Thompson* (1), where the loss was by a capture by a French privateer from the barratry of the master. The loss laid in the declaration was by capture, and it was urged that the loss was by barratry, and that it was therefore ill stated in the declaration and not proved as laid, but it was held by Lord Ellenborough that the plaintiff might disregard the barratry and sue for the

(1) 2 Camp. 620.

1882

CORY v. BURR.

Brett, L.J.

capture. That seems to me to be an authority for saying that the plaintiffs in the present case might but for the warranty have sued for the barratry disregarding the seizure, or for the seizure disregarding the barratry. It would be strange if the result should be now according to the form of pleading, when forms of pleading in these days do not affect the rights of parties. It seems, therefore, that the question here must resolve itself to this, whether the warranty from capture and seizure includes a seizure which is the result of barratry; in other words, whether it is confined to a certain description of seizure or whether it includes every kind of seizure. Had there been no authority on the subject it might have been argued that such a warranty was only against war risks, and indeed on the first complexion one would be inclined to think that it was only intended to be against such risks, but it has been decided otherwise. In *Kleinwort* v. *Shepard* (1) the loss was occasioned by the Chinese coolies on board the vessel, who rose on the officers and seized the vessel, and it was held that if there had been no warranty that would have been a loss by seizure. It was a loss by piracy within the risk insured against by the policy, but it was held to be nevertheless a loss by seizure. It was there argued that the warranty free from capture and seizure was only against war risks, and that the seizure by the coolies was not a war risk; but Lord Campbell and the Court of Queen's Bench held that the terms of the warranty could not be so confined, that it was not to be limited to a seizure which was the result of war, but included such a seizure as had occurred in that case. It must be observed that there the risks insured by the policy included a seizure which was by a piratical act, so that the warranty took out part of the risks enumerated in the policy. Although the action might there have been brought for the loss by piracy, or in the alternative for the loss by seizure, yet the assured could not by suing for the loss by piracy take the case out of the warranty from seizure.

Then there is the case of *Powell* v. *Hyde* (2), where there was a policy against ordinary loss but a warranty of free from capture and seizure. The ship was fired at by a Russian battery when

(1) 1 E. & E. 447; 28 L. J. (Q.B.) 147.

(2) 5 E. & B. 607; 25 L. J. (Q.B.) 65.

there was no war between England and Russia, and it was held that the firing was an attempt to capture or seize her. It was not the act of an enemy; and it was argued there again that the warranty only extended to war risks, and that therefore this attempt to seize was not such as the warranty applied to; but it was held that the terms of the warranty could not be so confined, and that they must be read according to their ordinary interpretation, so that they applied to all kinds of seizure.

It seems to me, then, that these cases are authorities for saying that the warranty must be read according to the ordinary interpretation of the words "seizure and capture," and that it includes all risks of seizure and capture; that is to say, that it is a warranty against seizure whether by an enemy or by piracy, and, as so enlarged, there is nothing to prevent it from applying to a seizure which is the result of barratry. If so, it is obvious the seizure here was within the warranty, and the plaintiffs cannot recover. It has been said that there are American cases in which the contrary has been held to what we are now deciding, and reference has been made to the cases of the *American Insurance Co.* v. *Dunham* (1), and *Wilcocks* v. *Union Insurance Co.* (2) If I thought that there were American authorities clear on this point, I do not say that I would follow them, but I would try do so, for I agree with Chancellor Kent, that, with regard to marine insurance law it is most advisable that the law should, if possible, be in conformity with what it is in all countries. I must further add, that although American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with an earnest desire to endeavour to agree with them. But the American cases which have been cited do not, I think, govern the present case. There the warranty was not this warranty, but was against any illicit trade, and the Court came to the conclusion that it meant a warranty against illicit trading by the owner, and that therefore an illicit trading without his knowledge or assent was not within the terms of the warranty. It was like the English case of *Havelock* v. *Hancill* (3), where

(1) 12 Wendell N. Y. Rep. 463; 15 Ibid. 9.

(2) 2 Binney, 574.

(3) 3 T. R. 277.

1882

CORY v. BURR.

Brett, L.J.

the insurance was on the ship whilst engaged in any lawful trade, and that was held to amount to a warranty against illicit trading by the owner. The American cases, therefore, do not, I think, apply to this case which must be decided according to *Kleinwort* v. *Shepard* (1) and *Powell* v. *Hyde*. (2) We ought not to differ from the decision in those cases on the interpretation of a warranty so old as this is, and according to the principle of those decisions this warranty against seizure is against seizure of any kind. There are many acts of barratry without seizure, and the effect therefore of this interpretration is only to take out of the enumerated insurance risks barratry which results in seizure. Both parts of the policy will then be construed consistently together, which they should always be if possible.

COTTON, L.J. The question in this case depends on the true construction and effect of a policy of marine insurance on the ship *Rosslyn*, which, amongst the perils insured against, includes barratry. The policy also contains a warranty by the insured against capture and seizure. We have to say what is the true construction and effect of the policy, having regard to these two clauses which apparently conflict with one another.

In consequence of the master having at Gibraltar taken a cargo for smuggling into Spain, the vessel was seized by the Spanish authorities. The action was to recover expenses incurred by the owner for the release of the vessel. The act of the master in taking the cargo was barratrous, and, as in cases of barratry there is an exception to the general rule that the loss must be referred to its proximate cause, but for the warranty the insured might have recovered the loss as occasioned by barratry. But the immediate cause of the loss was the seizure, and the question is whether the warranty deprives the insured of his right to recover? In my opinion it does.

It has been decided that in such a policy capture and seizure are not to be confined to capture and seizure by an enemy, and as this is the case I think that the words have to be construed to include capture and seizure for breach of the revenue law of a

(1) 1 E. & E. 447; 28 L. J. (Q.B.) 147. 5 Jur. N.S. 863

(2) 5 E. & B. 607; 25 L. J. (Q.B.) 65. 2 Jur. N.S. 657

foreign state. I think that the warranty must be construed as a limitation of the liability which would otherwise have been undertaken by the underwriters. Several of the perils insured against besides barratry, such as king's enemies and pirates, might have resulted in capture or seizure, and I think that the warranty protects the underwriters from loss in respect of the perils insured against, where such loss is the immediate result of capture or seizure. It was attempted to limit the effect of the warranty by applying it to those perils only which would probably result in capture or seizure. But I can see no sufficient reason for thus limiting the operation of the warranty, and if several perils insured against may produce capture or seizure, as well as other losses, the warranty must modify the liability of the underwriters in respect of all the perils which can produce the result mentioned in the warranty, which in terms applies to capture or seizure for whatever cause.

But it was said that the case was decided by authority: *Vallejo* v. *Wheeler* (1) was referred to. There the insured owners recovered a loss, the consequence of a barratrous deviation of the master, and it was argued that the implied condition against deviation was equivalent to the warranty in the present policy. But an implied condition only regulates what is not expressly provided for, and the implied condition against deviation cannot, in my opinion, modify the express provision as to barratry. *Havelock* v. *Hancill* (2) was also relied on: there the vessel was insured in any lawful trade against (amongst other things) barratry. Loss was incurred by the master barratrously engaging in a prohibited trade. The owner recovered against the underwriters. But there "in lawful trade" was construed, "during employment by the owner in lawful trade," that is by limiting the condition to acts of the owner. This was also the principle of the decisions in the cases in the United States to which we were referred, where warranty against seizure on account of prohibited trade was construed as a covenant against employment by the owner in unlawful trade.

Now as, in my opinion, these American cases do not govern the present case, it is unnecessary to decide how far we ought to

(1) 1 Cowp. 143. (2) 3 T. R. 277.

1882

CORY v. BURR.

Cotton, L.J.

follow or be guided by American cases. In my opinion they are not authorities, and as Brett, L.J., has expressed his opinion, I may say that, however desirable it may be, that the law of this country should be in harmony with that of America on such a matter as that of marine insurance, yet, in my opinion, American authorities are only to be looked at as guides in this way, that we should have regard to the reasons given by the judges, and so far as they do not conflict with what, in our opinion, is decided law in England, or what, when it is a question of construction, is, we think, the true construction of the instrument, we should get what assistance we can from the judgments of learned and able men. Beyond that, however, as at present advised, I am not prepared to recognize the authority of American decisions.

In my opinion, none of the cases which have been referred to on behalf of the plaintiffs are authorities in their favour, and the decision appealed from is, I think, right, and must be affirmed.

BRETT, L.J. The Lord Chief Justice agrees in this judgment.

Judgment affirmed.

Solicitor for plaintiffs: *H. C. Coote, for Adamson, North Sheilds.*

Solicitors for defendant: *Waltons, Bubb, & Walton.*

W. P.

[IN THE COURT OF APPEAL.]

1882
June 30.

TITTERTON *v.* COOPER.

Bankruptcy—Liquidation—Leasehold vested in Trustee on Appointment—Disclaimer—Election by Trustee to take Lease—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 17, 23, 24, 83 *subs.* 6, 89, 90, 125.

The leasehold estate of a bankrupt or debtor liquidating his affairs by arrangement vests absolutely in the trustee upon his appointment, and he has no right of election to accept or decline the leases, his only remedy being by disclaimer; and if he neglects or is unable to disclaim, he becomes personally liable in respect of the covenants contained in the leases as from the date of his appointment: but he is not liable for any breach of covenant happening before his appointment.

The plaintiff demised to M. a wharf for twenty-one years: the lease contained covenants for rent and repairs by the lessee. M. deposited the lease with S. as security for a debt. M. filed a petition for liquidation on the 8th of December, 1880, and the defendant was appointed trustee on the 3rd of January, 1881. The defendant never took possession of the wharf; but he negotiated with S. for the assignment of the lease to him: the negotiations proved abortive. The plaintiff served the defendant with a notice requiring him to disclaim; but the defendant failed to do this. The plaintiff then brought the present action to recover two quarters' rent, due respectively on the 25th of December, 1880, and on the 25th of March, 1881, and damages for breach of the covenant to repair:—

Held, that the plaintiff could not recover from the defendant the quarter's rent falling due on the 25th of December, 1880, because the defendant was not appointed trustee until the 3rd of January, 1881; but that the defendant was personally liable for the quarter's rent due on the 25th of March, 1881, and for breach of the covenant to repair, on the grounds, first, that by virtue of his appointment as trustee all the property of the liquidating debtor vested in him without any election on his part; and, secondly, if an election on his part was necessary, he had, by his conduct, elected to accept the lease.

ACTION upon the covenants in a lease for payment of rent and for repairs.

On the 16th of November, 1880, the plaintiff, by indenture, leased to B. Morison, his executors, administrators, and assigns, a wharf, for the term of twenty-one years from the 25th of December, 1879, determinable by the lessee at the end of the first three, seven, or fourteen years, at the yearly rent of 135*l.*, payable quarterly. The lessee covenanted to pay the rent and to keep the wharf in repair. On or about the 8th of December, 1880, Morison filed a petition for liquidation of his affairs by arrange-

1882

TITTERTON v. COOPER.

ment, and the defendant was appointed trustee under a special resolution dated the 30th of December, 1880, and his appointment was duly certified on the 3rd of January, 1881. On the 6th of January the plaintiff gave the defendant written notice requiring him to decide whether he would disclaim or not. The defendant applied to the Court of Bankruptcy for an extension of the period of time for disclaiming; but the Court ultimately refused to extend the time, and no disclaimer was executed by the defendant.

Before the date of the petition for liquidation Morison had granted an underlease of the wharf to C. D. Rowbotham, at an increased rent of 200*l.*, and a considerable arrear of rent became due by virtue of the underlease. Morison had deposited the lease of the wharf granted to him by the plaintiff with H. Sharp, one of his creditors, as security for 500*l.* H. Sharp proved his debt in the liquidation proceedings, and in his proof estimated the value of his security at 250*l.* The defendant had never received any rent for the wharf, nor had he taken any step for the recovery of the arrears of rent due from the underlessee: he had never entered upon or taken possession of the wharf. He negotiated with H. Sharp for the assignment of the lease to him; but the negotiations ultimately proved abortive after a considerable correspondence had passed upon the subject. The defendant had given the plaintiff notice to determine the lease at Christmas, 1882.

The present action was commenced on the 22nd of April, 1881, and was brought to recover the rent becoming due under the covenant of the lease on the 25th of December, 1880, and on the 25th of March, 1881, and also to recover damages for breach of the covenant to repair. At the trial, Huddleston, B., gave judgment for the plaintiff for 67*l.* 10*s.*, being the amount of the rent claimed by the plaintiff, and also for the amount due for repairs to be thereafter ascertained.

The defendant appealed.

June 29, 30. *A. Cohen, Q.C.*, and *C. J. Peile*, for the defendant. The question in this case is whether the defendant, as trustee for a liquidating debtor under the Bankruptcy Act, 1869,

s. 125 (1), is liable upon the covenants of a lease belonging to the debtor, although the defendant has never taken possession of

(1) By the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 141: "When any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him before he shall have obtained his certificate, and all debts due or to be due to him wheresoever the same may be found, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment; and after such appointment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London, or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

Sect. 142: "When any person shall have been adjudged a bankrupt, all lands, tenements, and hereditaments, except copy or customaryhold, in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to her Majesty, to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt, by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced, and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose."

Sect. 145: "If the assignees of the estate and effects of any bankrupt having or being entitled to any land, either under a conveyance to him in fee or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land or the benefit of such conveyance or agreement, or such lease or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the fiat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements, in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees shall decline to take such

1882

TITTERTON v. COOPER.

the demised hereditaments. The plaintiff's counsel may rely upon *Wilson* v. *Wallani* (1); but in that case it was unnecessary to

land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable if, within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land or conveyance or agreement for conveyance, or such lease or agreement for a lease, any person entitled to such rent, or having so conveyed or agreed to convey, or leased or agreed to lease, or any person claiming under him, shall be entitled to apply to the Court, and the Court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit."

By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 17: "Until a trustee is appointed, the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

"The expression 'trustee,' when used in this Act, shall include the person for the time being filling the office of trustee, whether he be the registrar or not; but when the registrar holds the office of trustee he shall, unless the Court otherwise orders, in the administration of the property of the bankrupt, apply to the Court for directions as to the mode of administering such property, and shall not take possession thereof unless directed by the Court."

Sect. 23. "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed pro-

(1) 5 Ex. D. 155.

decide the present question, for the trustees had entered upon the demised property by putting a man in possession. Stephen, J., in giving judgment in *Wilson* v. *Wallani* (1), laid some stress on *Cartwright* v. *Glover* (2), decided in 1861, where Stuart, V.C., appeared to think that under the Bankrupt Law Consolidation Act, 1849, s. 145, a bankrupt's interest in leasehold property remained in the assignees until they elected not to take the lease: but the decision of the Vice-Chancellor cannot be upheld, it was inconsistent with the judgment of the Court of Queen's Bench, in the earlier case of *Goodwin* v. *Noble* (3) delivered in 1857,

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perty to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Sect. 24. "The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the same or not."

Sect. 83, subs. 6. "The property of the bankrupt shall pass from trustee to trustee, including under that term the registrar when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever."

Sect. 89. "When a bankrupt is or has been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the civil service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension, as the Court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the Court, with the consent in writing of the chief officer of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, directs."

Sect. 90. "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the Court upon the application of the trustee, shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar, if necessary, after the close of the bankruptcy, to be applied by him in such manner as the Court may direct."

(1) 5 Ex. D. at p. 159.

(2) 2 Giff. 620.

(3) 8 E. & B. 587, at p. 602.

1882

TITTERTON v. COOPER.

where it was held that "the assignees of the bankrupt are not liable as assignees of the term, unless they have done some act which unequivocally indicates to the lessor, that they have elected to take the benefit of the lease." *Goodwin* v. *Noble* (1) does not appear to have been cited in *Cartwright* v. *Glover*. (2) The nature of the unequivocal act which would render the assignees liable may be gathered from *Mackley* v. *Pattenden* (3), where it was intimated that the assignment of a lease belonging to a bankrupt was an acceptance of it by the assignees. From these authorities it is clear that before the coming into operation of the Bankruptcy Act, 1869, assignees were not liable until they had done some unequivocal act manifesting their acceptance of the lease. The present defendant has done no act of that kind. Then has the Bankruptcy Act, 1869, altered the law in this respect? It is submitted that it has not. By s. 17, the property of the bankrupt, upon the order of adjudication being made, is to vest in the registrar, and on the appointment of the trustee it is to vest in him. By s. 23 the trustee has power to disclaim, and he may disclaim "notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto." According to the construction of s. 17, relied upon for the plaintiff, these words will be immaterial; for if a lease vests absolutely in the trustee by force of the statute, no subsequent act of his can have any effect upon his rights or liabilities. But in truth, these words shew that the power of election is preserved to the trustee, and they were intended to provide that he may disclaim even after he has elected to take the lease. Sect. 24 puts a check upon the misuse of the power of disclaimer. By the Bankruptcy Rules, 1871, No. 28, a trustee is not to disclaim without the leave of the Court of Bankruptcy; it would be a hardship to make a trustee liable upon the covenants of a lease belonging to a bankrupt, if he cannot obtain leave from the Court to disclaim.

[LORD COLERIDGE, C.J. No man is bound to become a trustee in bankruptcy; he accepts the office with its accompanying liabilities at his own risk.]

(1) 8 E. & B. 587, at p. 602. (2) 2 Giff. 620.
(3) 1 B. & S. 178.

A trustee is not bound to take damnosa hæreditas. Moreover, if the property passes out of the bankrupt immediately upon his adjudication, it will vest in the registrar of the Court, who will thereupon become personally liable upon the covenants of a lease belonging to the bankrupt until such time as a trustee shall be appointed. This is a result which the legislature cannot have intended. Sect. 83, sub-s. 6, expressly provides that the property of the bankrupt shall pass from trustee to trustee "without any conveyance, assignment, or transfer whatever;" no words of a like kind are to be found in s. 17; and this amounts to an implied declaration by the legislature that an acceptance of a lease by the first trustee is necessary. Sects. 89 and 90, which relate to the appropriation of portions of a bankrupt's salary, half-pay, or pension, shew that at least some kinds of property belonging to a bankrupt do not vest in his trustee.

The decisions under the Bankruptcy Act, 1869, support the argument for the defendants. *In re Sneezum, Ex parte Davis* (1) is an authority to shew that a trustee is not bound to carry out a contract entered into by the bankrupt, although he has not disclaimed it. There can be no difference between unprofitable contracts and leases. In *Ex parte Dressler, In re Solomon* (2) it was held that trustees were liable for the rent of hereditaments belonging to the bankrupt; but in that case they had taken actual possession. In *Ex parte Brook, In re Roberts* (3), by way of answer to an argument by counsel that a lease is vested in the trustee until he disclaims, James, L.J., said: "I think it is in gremio legis." In *Lowrey* v. *Barker* (4) it was held by all the members of the Court of Appeal then present that a trustee in bankruptcy upon disclaimer of a lease granted to the bankrupt does not become personally liable to the lessor, either upon an implied contract of tenancy, or as a trespasser, in respect of the period between the time when his actual occupation ceases, and the date when the disclaimer is executed; but two of the members of the Court (Cockburn, C.J., and Thesiger, L.J.) doubted whether upon the execution of the disclaimer all personal liability of the trustee ceases in respect of the period during which he has had an

(1) 3 Ch. D. 463.
(2) 9 Ch. D. 252.
(3) 10 Ch. D. 100, at p. 105.
(4) 5 Ex. D. 170.

1882

TITTERTON v. COOPER.

actual occupation of the demised hereditaments. However, this latter question does not arise in the present case, inasmuch as the defendant never was in the occupation of the wharf.

The defendant is not liable by reason of the principles applicable to the old law; he has committed no unequivocal act testifying his election to take the wharf: assignees might always make experiments to ascertain the value of the property devolving upon them; and the defendant has done no more than this.

Moreover, the judgment is wrong in amount; the defendant is not liable for the quarter's rent falling due on the 25th of December; this is a case of liquidation by arrangement under the Bankruptcy Act, 1869, s. 125: and by force of s. 18 and s. 125, sub-s. 6, his appointment dates from the time when it was certified, namely, the 3rd of January. He cannot be liable for any claim accruing due before the date of his appointment.

Then the damages for not repairing the wharf in breach of the covenant are only nominal: the lease of the wharf was for the term of twenty-one years, and the measure of damages is the amount by which the reversion has become deteriorated: *Mills* v. *East London Union*. (1) Only two or three years have expired, and the plaintiff cannot recover for the dilapidations actually existing until the lease has been determined by effluxion of time.

A. Cock (*Kemp, Q.C.*, with him), for the plaintiff. First, the defendant elected to take the lease; he negotiated for the disposal of it, and applied for further time to disclaim.

Secondly, the lease vested in the defendant absolutely. There is a wide difference between the Bankrupt Law Consolidation Act, 1849, s. 145, and the Bankruptcy Act, 1869, s. 17; the difficulties which arose under the earlier Act do not occur under the later, for by s. 17 the lease vests in the registrar "immediately upon the order of adjudication being made," and upon the appointment of a trustee it "forthwith" passes to him. *In re Sneezum, Ex parte Davis* (2) was a case of contract, and the point there decided was that trustees could refuse to perform it at any stage when it became unprofitable, and that the contractors could only prove against the insolvent estate under s. 31. It is true

(1) Law Rep. 8 C. P. 79. (2) 3 Ch. D. 463.

that the facts in *Ex parte Dressler, In re Solomon* (1) are not identical with those in the present case; but the decision goes to shew that the defendant is personally liable.

As to the quarter's rent falling due on the 25th of December, the title of the trustee relates back to the filing of the petition on the 8th of December, and therefore his liability accrues from the same date.

As to the breach of the covenant to repair, the defendant has given notice to determine the lease at Christmas, 1882, and therefore the measure of damages will be the injury which the reversion will have sustained when it becomes an estate in possession at that period; that injury is for all practical purposes the amount which it will now take to put the wharf into proper repair.

C. J. Peile, in reply. It must be admitted for the defendant that, under the circumstances of this case, if he is liable at all for breach of the covenant to repair, he is liable for the full amount necessary to put the wharf into repair. But as to the question whether an election to accept has been exercised, it appears to have been held in *Ex parte Blandy, In re Foster* (2) that not to take any step with reference to a part of the bankrupt's estate was evidence not of acceptance, but of rejection of it; and in *Mackley* v. *Pattenden* (3) it was held that the assignee must accept the lease within a reasonable time; the defendant, as trustee, has allowed so long a time to elapse without adopting the lease that he cannot now accept it; and if he cannot now take it, he cannot be liable upon the covenants therein. The trustee must perform an act of ownership amounting to an unequivocal acceptance of the term before he can be held liable upon the covenants; in *Turner* v. *Richardson* (4) it was held that merely to advertise for sale premises comprised in a lease and to put them up to auction was not equivalent to an acceptance of the term, for it was a mere experiment to ascertain their value. *Turner* v. *Richardson* (4) was followed as a binding authority in *Lindsay* v. *Limbert*. (5) It is true that in *Hastings* v. *Wilson* (6) the assignees of a bankrupt who had put up leasehold property to auction were held liable

(1) 9 Ch. D. 252.
(2) 1 Deacon, 286.
(3) 1 B. & S. 178.
(4) 7 East, 335.
(5) 12 B. Moore, 209.
(6) Holt, N. P. C. 290.

1882

TITTERTON v. COOPER.

upon the covenants; but they had found a purchaser and received a deposit, which they afterwards were compelled to return. That was a clear case of election. The remedy of the present plaintiff for any loss which he may sustain, is by proof against the estate of the liquidating debtor under the Bankruptcy Act, 1869, s. 31.

With regard to the argument that the liability of the trustee relates back to the date when the petition for liquidation was presented, and includes the quarter's rent due on the 25th of December, it is submitted that he cannot be held liable retrospectively, that is, for any sum accruing due before his appointment was certified on the 3rd of January. The plaintiff, as lessor, must prove against the estate for that quarter's rent, even if the defendant, as trustee, is liable for the subsequent rent.

LORD COLERIDGE, C.J. In this case we have to put a construction on the 17th and 23rd sections of the Bankruptcy Act, 1869. The action is brought against the trustee of one Morison, who had been possessed of a wharf by a demise for a term of years, and who had covenanted to pay the rent and to keep the wharf in repair. Morison afterwards filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869, s. 125, and the defendant was appointed his trustee. The question is whether the defendant is personally liable upon the covenants as assignee of the lease.

Two points have been argued before us; first, that ss. 17 and 23 of the Bankruptcy Act, 1869, have made no material alteration in the previously existing law of bankruptcy; secondly, if that is the case, the defendant has done nothing which would have rendered him liable under the Bankrupt Law Consolidation Act, 1849, and therefore he is not liable under the Bankruptcy Act, 1869. I am of opinion against the defendant upon both points. The Acts of 1849 and of 1869 are different in their operation, and the latter was passed to create a fresh state of the law. Under the earlier Act leases passed by virtue of the appointment of the assignees; in ss. 141, 142, the word "vest" is used, and it has been assumed that because the word "vest" is used in the earlier Act, it must be deemed to be used in the same sense in the later Act, and that before the trustee can be made liable he must shew by his con-

1882

TITTERTON v. COOPER.

Lord Coleridge, C.J.

duct that he has accepted the lease, in fact he must commit some unequivocal act testifying his consent to the vesting of the term in himself. I cannot concur with this assumption. The language of the two Bankruptcy Acts is very different. I do not rely so much on the words of the Bankruptcy Act, 1869, ss. 17, 23, as on the qualification placed on the word "vest" by the 145th section of the Bankrupt Law Consolidation Act, 1849. That section deals with three distinct states of circumstances: first, where the assignees have elected to take the lease; secondly, where they have declined to take it; thirdly, where they have failed to adopt either course. These provisions indicate what the object of the legislature was; they shew that although the property of the bankrupt was intended to vest in the assignees, yet before it could vest some act must be done to declare the election of the assignees. Upon turning to the statute of 1869 we find that the language of s. 17 is very different: it provides that "immediately on the order of adjudication being made the property of the bankrupt shall vest in the registrar: on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." Sect. 17 does not contain any expression like that in the earlier Act directing that the property should vest in the assignees "by virtue of their appointment," and it is to be noticed also that the word "forthwith" which occurs in the later Act is absent from the earlier. Therefore, upon the reasonable construction of what may be called the "vesting" sections, a marked difference exists between the former and the present law. Sect. 23 of the Bankruptcy Act, 1869, creates a still wider distinction. I need deal only with the provisions relating to land: it enacts that "when any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants . . . the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall . . . if the same is a lease, be deemed to have been surrendered" on the date of the order of adjudication. These provisions are couched in very different language from the enactments in the earlier statute, and require

1882

TITTERTON v. COOPER.

Lord Coleridge, C.J.

a different interpretation. The trustee may *acquire* under the Bankruptcy Act, 1869, a lease burdened with onerous covenants: the property therein must surely vest in him forthwith; he may disclaim the lease, but this privilege also implies that until disclaimer it belongs to him. It is true that the disclaimer is to relate back to the order of adjudication; but the reasonable interpretation is that the property in the lease is vested in him together with its burdens, and that if he does not disclaim he must pay the rent and perform the covenants contained in the lease. This view is strengthened by s. 24 of the Bankruptcy Act, 1869; if a trustee who is required to decide whether he will disclaim or not fails to do so within a specified time, he will not be afterwards allowed to disclaim; this provision puts a limit on the power to disclaim. It has been urged that, according to the view which I have taken, the registrar of the Court, in whom the property of the bankrupt vests upon the order of adjudication, may become liable to pay the rent and perform the covenants contained in a lease. It is true that the bankrupt's property may not immediately devolve upon a trustee appointed by the creditors; but practically it passes from one trustee to another. The trustee is to be appointed at the general meeting of the creditors, unless his appointment is left to the committee of inspection. No liability to the lessor can devolve upon the registrar, except during the short period which may elapse before the appointment of the trustee. I do not think it a matter of practical importance, but I admit that it raises a difficulty. But, in the view which I take, it is immaterial whether anything was done by the trustee to manifest his election; no act upon his part was necessary; he could only get rid of his liabillty under the lease by a disclaimer. On the ground that the defendant is liable by virtue of the provisions in the Bankruptcy Act, 1869, I think that the judgment of Huddleston, B., ought to be upheld.

As to the second point, I think that even under the law existing before the Bankruptcy Act, 1869, the defendant is liable; he attempted to sell the lease and did his best to get rid of it, although his efforts to negotiate a transfer proved ineffectual. A class of cases under the old law exists which illustrates the difference between what was, and what was not, sufficient to constitute an

election on the part of the assignees: I may mention *Turner* v. *Richardson* (1) and *Hastings* v. *Wilson*. (2) A distinction exists amongst the cases falling under this class. Where nothing more was done by the assignee than to get materials upon which he might exercise his judgment as to the best course to be taken for the benefit of the estate, he was not deemed to have elected to take the term: thus in *Turner* v. *Richardson* (1) the assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt had been lessee, for sale; they did not state themselves to be the owners or possessed thereof, no bidder offered, and it was not proved that they ever took possession in fact of the premises; and it was held that this was no more than an experiment to ascertain the value, whether the lease was beneficial to the creditors, and did not amount to an assent on the part of the assignees to take the term; by putting up the property for sale the assignees merely endeavoured to gain information as to whether the lease would be profitable to the bankrupt's estate. On the other hand, in *Hastings* v. *Wilson* (2), the assignees had put up the property comprised in the lease to the bankrupt for sale, and had obtained a purchaser who paid a large deposit: for some reason which was not clearly explained the purchase fell through and the deposit was returned, and afterwards the assignees again endeavoured to sell the property: in an action against the assignees upon the covenants in the lease it was contended that they were not liable, and reliance was placed upon *Turner* v. *Richardson* (1); but Gibbs, C.J., in effect distinguished that case, and held that the assignees were liable. I think that the view of that learned judge as to the then existing law was correct, the two cases are quite distinguishable, and it is impossible to say that in *Hastings* v. *Wilson* (2) there was no election by the assignees to take the lease.

The result of my opinion is that the defendant as trustee is liable whether we look to the true construction of the Bankruptcy Act, 1869, ss. 17, 23, or whether we look to the decisions upon the earlier Acts and the principles therein enunciated.

Upon the lesser point, which has been argued, I think that the trustee is entitled to succeed; he is not liable for the rent which

(1) 7 East, 335. (2) Holt, N. P. C. 290.

1882

TITTERTON v. COOPER.

has accrued due before his appointment: as to all that he is relieved from liability, and the estate of the liquidating debtor remains charged with it.

BRETT, L.J. This is an action to recover rent and damages under the covenants in a lease; it is brought against the trustee of the insolvent personally, and the question is whether the trustee is personally liable; that depends upon the further question, whether the lease has become vested in him; for if it has, he is personally liable. It has been argued that under the Bankruptcy Act, 1869, before the trustee can be held liable under the covenants contained in a lease, he must accept and adopt it as his own, and that the present defendant never accepted the lease granted to Morison. It has been contended that the failure to disclaim was not such an act as would render the trustee personally responsible, because it was not evidence of an acceptance, and it has been further contended that an acceptance must be testified by some positive act. That argument admits that if the trustee has done some positive act he will be personally liable. What is the nature of the positive act which is to render a lease of a bankrupt binding upon his trustee? It is said that it must be some unequivocal act shewing an election to take the lease. If an unequivocal act be necessary, I think that it has occurred in the present case. It is not easy to enumerate what may be called unequivocal acts; but I may mention the taking possession of the premises demised by the lease, and the exercise of any similar act of ownership such as an attempt as owner to sell the term. It was held in *Turner* v. *Richardson* (1) that the putting up of the demised premises to auction, merely for the sake of obtaining biddings whereby the value might be tested, was not conclusive evidence of an election to take the lease, because it was merely a preliminary act in the discharge of the duty as assignees; but it follows from the reasoning of the judges in that case that a person who puts up property at an auction alleging that he is the owner and that he wishes to sell as owner, thereby exercises an act of ownership. No man can assert that he, as owner, has a right to sell without asserting that he is owner. In

(1) 7 East, 335.

1882

TITTERTON v. COOPER.

Brett, L.J.

the present case when the defendant negotiated for the sale of the lease, he, even according to his own view of the Bankruptcy Act, 1869, became liable upon the covenants.

But the view of that statute urged on behalf of the defendant is not the true view. In my view the lease vested in him immediately upon his appointment as trustee. The question depends upon the Bankruptcy Act, 1869, s. 17, which is the "vesting" section: s. 23 is not the vesting section, it simply enables the trustee to disclaim; it can only be read as helping to the construction of s. 17. It has been argued that the lease never vested in the defendant. In order to construe the Bankruptcy Act, 1869, we have a right to look back at the Bankrupt Law Consolidation Act, 1849, although as that Act has been repealed, it can be referred to usefully only for the purpose of commenting on the Bankruptcy Act, 1869. In the earlier Act s. 142 is the vesting section; if it had stood alone, the property of the bankrupt would have vested in the assignees without a positive act of acceptance; but s. 145 was inserted in order to control s. 142. It has been in effect contended that s. 23 of the Bankruptcy Act, 1869, ought to be construed as s. 145 of the Bankrupt Law Consolidation Act, 1849, and that the property of a bankrupt ought not to vest in the trustee until he has elected to take it. But the words of the two statutes are different, and we ought to hold that they differ for a reason. The words of the statutes must be considered, and we must attempt to construe them in the meaning intended by the legislature. In the 17th section words are used which do not admit of a doubt; it provides that "immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar; on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." The property which is to vest in the registrar and the trustee is "property" as defined by s. 4; it includes every description of estate and interest in land, and it therefore includes a lease. When we look at s. 23 we must not forget that a lease is to be treated as "property" falling within s. 17; it vests in the registrar, not when he accepts it, but "immediately upon the order of adjudication being made." The words are not vague. As regards a trustee, the time is fixed; a lease vests in him on the

1882

TITTERTON v. COOPER.

Brett, L.J.

very moment of his appointment, no time is given to the trustee to consider whether he will make an election; the word "forthwith" cannot be omitted, and the lease vests in him at once. As we know the difficulties which occurred under the Act of 1849, it is easy to understand that this word was inserted in order to do away with the doctrine of acceptance. It is plain that the trustee becomes personally liable. It was further contended that the right of election is kept alive for the benefit of the trustee by virtue of the words in s. 23 which, it was said, do away with the express terms of s. 17; and reliance was placed on the provision "notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto." It may be said that these words are immaterial, or at all events they can apply only to property other than leases. But perhaps that is not the true construction; probably they were inserted in order to meet points similar to those which had been raised in cases under former enactments: without this provision it might have been said that if a trustee had done some act shewing that he considered himself the owner of the lease, he could not afterwards disclaim it; the words were inserted out of caution in order to shew that the trustee was not bound to take the lease, merely because he had endeavoured to realise it for the benefit of the estate. Sect. 17 is not varied by anything to be found in s. 23; and s. 24 does not help us to construe it. Reliance was placed upon ss. 89, 90, but they relate to property which does not pass to the trustee; they are not limiting but empowering enactments.

It has been contended that we are prevented from affirming the judgment of Huddleston, B., by *In re Sneezum, Ex parte Davis* (1); but I do not think the decision in that case applicable. It was not an action upon the covenants of a lease, but it related to an executory mercantile contract. The trustees performed it for some time, but they afterwards ceased to fulfil it. The question then arose whether they could be personally liable on the contract; and that depended on the further question whether they had personally taken and adopted it. I understand that case to have gone upon the principle that the trustees took the contract

(1) 3 Ch. D. 463.

1882

TITTERTON v. COOPER.

Brett, L.J.

as assignees, and that they could not be sued by Messrs. Davis, with whom the insolvent debtor originally contracted, for there was no privity of contract between them: whereas the assignee of a lease is personally liable to the lessor, there being privity of estate between them; and by force of the Bankruptcy Act, 1869, the trustee is assignee of the leases belonging to the bankrupt. Other points were decided in that case which it is not necessary to consider. Reference was made to *Ex parte Dressler, In re Solomon* (1), and reliance was placed on some words of my own. It is true that I stated the facts; and when facts exist which will render a judgment à fortiori, it is customary to state them. But it does not seem to me that the non-existence of those facts would have altered the decision in that case. The true way of explaining what was said in that case is, that the present state of circumstances was not within the purview of the judges who decided it. There is certainly nothing in the judgments inconsistent with the interpretation of s. 17 which we have adopted. It seems to me that we are not concluded by any of the cases cited. As to the interpretation of the statute I agree with the view taken by Huddleston, B., and I agree with the view of the statute which was laid down in the more elaborate judgment of Stephen, J., in *Wilson* v. *Wallani*. (2)

So far I think that the defendant fails to succeed, and that the decision was right as to the principle upon which it proceeded. But a question has arisen as to the first of the two quarters, which does not appear to have been much argued in the Court below. The trustee is not shut out from raising the question here, and I think that he is not personally liable for the first quarter. It seems to me that, whether a positive act of acceptance is necessary or not, a man cannot be personally liable as assignee of a lease for rent which was due and payable before he became such assignee. Until he became the assignee of the lease, and until he became the person holding by and under the lease, it seems to me impossible to say, on any theory of law, that he is liable for the rent which accrued due and was payable before that time. The words of s. 17 seem to me precise as to the moment of time for determining both antecedent and subsequent obligations. The time fixed upon is

(1) 9 Ch. D. 252. (2) 5 Ex. D. 155.

1882

TITTERTON v. COOPER.

Brett, L.J.

the moment of the trustee's appointment. He is liable for nothing before that time. With regard to the quarter ending on the 25th of December the trustee is not liable, although it accrued due after the petition for liquidation was presented.

Some question was raised whether the lessor can recover more than nominal damages for breach of the covenant to repair; but this is an immaterial point, for under the circumstances of the case the same result follows whether the injury to the reversion or the actual cost of the repairs be considered. The arbitrator will give the proper cost of putting these premises into repair.

Upon the whole I think that this appeal must be dismissed, except as to the question of the first quarter's rent.

COTTON, L.J. In this case the defendant is sued as trustee for a liquidating debtor, and he has been held liable for rent and breach of covenant, not upon the ground of any special provision in the Bankruptcy Act, 1869, but upon the ground that its true construction creates a privity of estate between him and the lessor. By virtue of that statute he has become the assignee of a lease containing covenants for payment of rent and for repairing the demised premises, which have not been fulfilled. We start with the assistance of a case in which it has been decided that although no special provision imposes the liability on the trustee, nevertheless he becomes the assignee of a leasehold vested in the debtor, and, like every other assignee, he becomes liable for the rent and for the performance of the covenants during the time that the lease is vested in him. It has been argued that in order to make the trustee liable he must have some beneficial occupation of the property, and that he must be in actual possession. But, in my opinion, that is not the right rule of construction. Even when acceptance of a lease was necessary, the question was not whether the assignee had been in possession and had occupied beneficially, but whether acts had occurred which shewed that he had accepted the lease. It is true that in many of the cases possession is referred to; but possession of leasehold property is the very strongest proof that a person to whom a conveyance has been made has accepted it, and has become assignee of the lease. Possession is not the true test; and if a trustee in bankruptcy becomes assignee of the

11 QBD 96

leasehold property, he is liable for the rent and upon the covenants during the time that he is assignee. Under the former Bankruptcy Acts it had been held that acceptance on the part of the assignees was necessary, as in the case of an ordinary transfer, in order to effectually vest the term in them. But in the ordinary case, where there has been merely a conveyance by deed inter partes, it is necessary that the party to whom the conveyance is made should accept the transfer which the deed purports to make to him. In this case, if it be necessary that there should be an acceptance by the defendant as trustee, in my opinion enough has been done to constitute an acceptance of this lease, because he took upon himself, as owner, to dispose of the property. It is true that he did not effectually do so: there was not any contract; but the acts which he did were not done in order to ascertain what the value of the property was and to make up his mind whether he should accept it; they were acts done by him as owner wishing to dispose of the lease. In *Turner* v. *Richardson* (1) the property was put up to auction merely for the purpose of testing its value. In the present case the trustee adopted a different course of conduct: he continued to treat with a person who, he had reason to think, was willing to buy, and he continued to make offers of terms on the assumption that the power of dealing with the property belonged to him.

These considerations would really dispose of the question; but in order that it may not be thought that I differ from the other members of this Court as to the construction which has been put on the Bankruptcy Act, 1869, I think it better to state my view as to this statute.

Undoubtedly, under the former Acts, which are in some respects like the present Act, it has been held that acceptance was necessary; but what we really have to do is to construe the words of this statute. We may derive assistance from cases decided on the former Acts of Parliament; but the question which we have to decide is what is the meaning of the Bankruptcy Act, 1869, taken as a whole. The principal section is undoubtedly s. 17; it vests the property in the trustee. It is true that we are now dealing with a case of liquidation by arrangement: but the same

(1) 7 East, 335.

1882

TITTERTON v. COOPER.

Cotton, L.J.

principle applies as to bankruptcy. On the appointment of the trustee the property passes to and vests in the trustee appointed. The words "pass to" mean "pass from the registrar to the trustee." That, in my opinion, is an enactment that the property shall pass to and vest in the trustee upon his appointment, so as effectually to make him the assignee or transferee of the property without any further act done by him. It may seem hard that a trustee should become personally liable upon the covenants of the lease; but he has undoubtedly a right to be indemnified out of the debtor's estate. And s. 23 provides an effectual remedy, because it enables him to treat a lease passing to him, as if it had been surrendered at the date of adjudication, and therefore had never been vested in him. It was argued that s. 23 only applied when certain things had been done which would otherwise be an acceptance. The argument was founded upon these words: "Notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto." It was contended that the meaning of the statute is that though the trustee has accepted the lease, yet he shall have the power to disclaim, and the power to disclaim is given only to take effect and to operate in the case of an acceptance. But, in my opinion, the section has a general operation, and gives to a trustee who has onerous property vested in him power to disclaim it; and in order to prevent the argument that when the trustee has actually done something shewing the wish to take the property, he cannot afterwards exercise the power of disclaimer, it introduces the words which I have quoted. The section confers an effectual mode of getting rid of any liability, which the trustee may have incurred through the statute vesting in him the lease without his consent. Allusion has been made to s. 83, sub-s. 6, but that enactment merely carries out the intention of the legislature that no assignment or conveyance shall be necessary to pass the property from one trustee to another. Our attention has been called to ss. 89, 90; but those sections relate to property which is not assignable, such as the half-pay of an officer, and which therefore is not affected by s. 17.

Reliance has been placed on decisions under the Bankrupt Law

Consolidation Act, 1849, s. 145. That enactment corresponds in some respects with the Bankruptcy Act, 1869, ss. 23, 24, but it is different in its terms, for it assumes that acceptance is necessary on the assignees' part before the property will vest in them. The difference of language requires a difference of interpretation.

It has been further contended that this case must be governed by certain previous decisions of this Court, and reference has been made to *In re Sneezum, Ex parte Davis.* (1) All that that case decided was that under the Bankruptcy Act, 1869, the trustee was not either personally or to the extent of the debtor's estate liable on a contract existing at the time of the insolvency. If the trustee had been simply assignee of the contract of the debtor and of the debtor's estate, independently of any enactment neither he nor the debtor's estate would have been liable for any breach of the contract; and this Court held that the Bankruptcy Act, 1869, did not render the trustee liable to be sued by the contractee. The principle of the decision did not extend to leaseholds. Reference was made also to *Ex parte Dressler, In re Solomon.* (2) I agree with the decision in that case, and I agree also with the comments of Brett, L.J., upon it. The trustee had taken possession of the demised premises and, undoubtedly, that was an acceptance of the lease, of which he thereby became assignee, whatever may be the true construction of the Bankruptcy Act, 1869.

To state my view of the Bankruptcy Act, 1869, in a few words, the mere fact of the defendant being appointed trustee under ss. 17, 125, without any acceptance on his part, vested in him, and made him the assignee of, the leasehold property belonging to the debtor, and therefore he is liable upon the covenants for rent and repairs.

A question arose as to whether the defendant is liable for a quarter's rent, that had accrued due before the date of his appointment, when the property of the liquidating debtor vested in him. In my opinion, he is not liable for any rent that accrued due before the time when he became assignee. He is liable, not by reason of any express provision in the Bankruptcy Act, 1869, but because the statute makes him an assignee, and the same

(1) 3 Ch. D. 463. (2) 9 Ch. D. 252.

1882

TITTERTON v. COOPER.

Cotton, L.J.

liability attaches to him as to an ordinary assignee. In my opinion, he cannot be liable for any claim for which an ordinary assignee would not be liable. It is true that the property of the debtor has vested in him, but his liability arises from the statutory transfer, and, in my opinion, it ought not to be extended so as to make it relate back to a period previous to that at which the debtor's estate vested in him.

I need not say anything as to the question of damages.

Judgment affirmed, except as to the one quarter's rent falling due on the 25th of December, 1880.

Solicitor for plaintiff: *W. A. Downing.*
Solicitors for defendant: *Keen & Rogers.*

J. E. H.

April 29.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF HER MAJESTY'S TREASURY *v.* THE MAYOR, &c., OF THE BOROUGH OF MAIDENHEAD, AND MORRIS, TREASURER OF THE BOROUGH.

Municipal Election—Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 *Vict. c.* 60), *s.* 14, *sub-sect.* 5, 20, 22)—*Expenses of Election Court—Amendment of Order—Court of Record—Certificate of Commissioners of Treasury—Rate—Mandamus.*

Upon the trial of a petition against the return of a borough councillor under the Corrupt Practices (Municipal Elections) Act, 1872, the barrister in delivering judgment said that he found the councillor guilty of personal bribery, and that all the costs of the inquiry were to be borne by him, and made an order in writing for the payment by the councillor of certain costs under s. 19 of the Act. The written order made no provision for the remuneration and allowances to the barrister and other persons under s. 22. The Lords Commissioners of the Treasury paid the amount of such remuneration and allowances and certified the payment to the borough treasurer, and required him to repay them the amount out of the borough fund or rates as provided by s. 22. A rate was accordingly made and levied. The commissioners, afterwards, on receiving from the barrister a letter that he had always intended to visit all the costs upon the councillor, and had said so in giving judgment, cancelled their certificate, and the borough corporation abandoned their rate and returned the sums levied to the ratepayers. Afterwards the commissioners, finding that the barrister had made no written order for the payment of the remuneration and allowances under s. 22, issued a fresh certificate requiring the borough treasurer to repay them out of the borough fund or rates the amount of such remuneration and allowances. These

facts being raised upon the return to a mandamus commanding the treasurer to repay the commissioners out of the borough fund or rate, and the corporation to cause such repayment:—

Held, that no valid order was made by the barrister for the payment of such allowances and remuneration under s. 22; that the election court for the trial of petitions under the Act was by virtue of s. 14, sub-s. 5, a court of record, and that neither the Queen's Bench Division nor the Court of Appeal on the return to the mandamus could amend the barrister's order so as to make it include the payment of such remuneration and allowances; that the act of the commissioners in certifying was not a judicial act, and that they had the power to make the second certificate; and were entitled to a peremptory mandamus compelling the treasurer to repay to them the amount of such remuneration and allowances out of the borough fund or rate, and compelling the corporation to order such amount to be levied by a borough rate.

APPEAL by the defendants from the judgment of the Queen's Bench Division (1) awarding a peremptory writ of mandamus. The facts are fully stated in the judgments of Manisty, J., and Pollock, B., delivered in that court, and it is necessary here only briefly to recapitulate them.

A petition having been presented against the return of Robert Walker and W. Dawson as town councillors for the borough of Maidenhead, it was tried in March, 1875, before C. J. Coleman, barrister-at-law, who on the 10th of March delivered judgment, and on the 11th of March certified to the Court of Common Pleas that Walker and Dawson were not duly elected. On the latter day Mr. Coleman signed an order in writing, whereby he directed that all the costs, charges, and expenses of and incidental to the preparation of the petition and the proceedings consequent thereupon should be paid by the respondents Dawson and Walker, in equal and undivided shares. On the 2nd of August, 1875, two Commissioners of the Treasury certified to the defendant Morris, as treasurer for the borough of Maidenhead, that they had paid the remuneration and allowance to the barrister, Mr. Coleman, the officers, clerks, and short-hand writers, engaged upon the petition, and demanded repayment. The town council of the borough on the 6th of August resolved to levy a rate of 6*d.* in the pound in order to repay the commissioners. On the 25th of August, 1875, the Commissioners of the Treasury issued a further certificate amending a slight error in the first certificate. On the

(1) 8 Q. B. D. 339.

1882

THE QUEEN v. MAYOR OF MAIDENHEAD.

4th of October the Commissioners of the Treasury cancelled the two certificates, and informed the defendant Morris thereof, on the ground that in September it had been represented to the commissioners that the respondent, W. Dawson, had been found guilty of personal bribery and ordered to pay the costs of the inquiry. The representation was confirmed by the barrister, Mr. Coleman, in the following letter dated the 27th of September, 1875, written to the Commissioners of the Treasury :—

"It was always my intention to visit upon Mr. Dawson the costs relating and belonging to the inquiry. I said so in giving judgment. Dawson was proved to have been guilty to my satisfaction of personal bribery, and I thought the ratepayers of Maidenhead ought not to be asked to pay the expenses of an inquiry brought about by reason of his having done so. Mr. Lush, my registrar, is now in London, and will take any further steps, if any, which may be required in the matter."

And the following order was afterwards drawn up by the barrister :—

"Corrupt Practices (Municipal Elections) Act, 1872.

"Maidenhead Municipal Election Petition.

"William Lovering, petitioner.

"Robert Walker, William Dawson, Richard Swallow Poulton, respondents.

"Having upon the hearing of the petition found the respondent, William Dawson, personally guilty of corrupt practices at the election, I do order that the said respondent, William Dawson, pay to the town clerk the expenses incurred by him for receiving the court under the provisions of the above-mentioned Acts.

"Dated this 4th day of October, 1875.

"Charles James Coleman." (1)

The town council of the borough on the 3rd of December, 1875, resolved that the amounts collected on the rate of the 6th of

(1) The reporter is informed (and it was so stated during the argument in the Queen's Bench Division) that upon Mr. Coleman's letter of the 27th of September, 1875, being communicated to the registrar, that gentleman declined to take any further steps on the ground that he was functus officio, and that the order of the 4th of October, 1875, was drawn up without the intervention of the registrar.

August should be returned, and they were accordingly returned to the ratepayers. On the 9th of December, 1875, two Commissioners of the Treasury again certified to the defendant Morris that they had paid the remuneration and allowance to the barrister, the officers, clerks, and short-hand writers engaged upon the petition amounting to 376*l.* 18*s.* 10*d.*, and demanded repayment. The reason for issuing a fresh certificate after the former had been cancelled, was that the Commissioners of the Treasury were advised that it was not competent to the barrister to order the respondent Dawson to pay the costs, he being functus officio. No part of the borough fund of Maidenhead was available for the repayment to the Commissioners of the Treasury of the remuneration and allowance, and no rate was made to raise the required amount. On the 8th of June, 1876, the solicitor to the treasury demanded payment of the sum of 376*l.* 18*s.* 10*d.* within one month, and this demand not having been complied with, on the 8th of August, 1876, a rule nisi was obtained to shew cause why a writ of mandamus should not issue to compel repayment by the corporation of Maidenhead to the Commissioners of the Treasury. The rule having been made absolute, the writ issued and a return was made to it. The issues of fact came on for trial before Mellor, J., and a special jury in March, 1879. At the trial oral evidence was tendered on behalf of the defendants to shew that Mr. Coleman did in delivering judgment on the 10th of March orally order that the expenses of receiving the Court, and also the allowances, remunerations, and expenses of the barrister, officers, clerks, and others should be paid by the respondent Dawson. The evidence was objected to by the prosecution, but was admitted. The defendants also sought to put in evidence the letter of the 27th of September, which the judge thought inadmissible. The jury found in answer to a question put by the judge, that there was sufficient evidence that Mr. Coleman did order the whole of the costs to be paid by the respondent Dawson and not by the borough of Maidenhead. The judge, however, directed that a verdict should be entered for the Crown for damages 376*l.* 18*s.* 10*d.*, subject to the opinion of the Court on a special case.

The special case having been stated, a majority of the Queen's Bench Division (Lord Coleridge, C.J., and Pollock, B.), were of

1882

THE QUEEN v. MAYOR OF MAIDENHEAD.

opinion that a peremptory mandamus should issue for repayment of 376*l.* 18*s.* 10*d.* to the Commissioners of the Treasury, Manisty, J. being of a contrary opinion. (1)

The defendants appealed.

April 26, 28, 29. *H. Matthews, Q.C.*, and *H. D. Greene*, for the defendants. It is clear that the barrister holding the election court intended to order the respondent Dawson, whom he found guilty of personal bribery, to repay the Commissioners of the Treasury the expenses devolving upon them under the Corrupt Practices (Municipal Elections) Act, 1872, s. 22; and this Court has power to amend the written order of the election court made on the 11th of March, 1875, so as to make it correspond with the intention of the barrister; the election court is not a court of record; it cannot issue execution for costs which are directed to be paid: the order of the barrister must be made a rule of the superior court: *Pare* v. *Hartshorn.* (2)

[JESSEL, M.R. Surely the election court is a court of record. We are the judges of the Court of Appeal: the order of the barrister for costs is not in our custody: how can we amend it?]

If the election court is a court of record, the order for costs is not a record: there may be a court of record without records: *Harmer* v. *Bean.* (3)

[JESSEL, M.R. I cannot assent to that contention; it is unmeaning to say that there may be a court of record without records. If the election court is a court of record, its order can be proved only by the production of the record.]

No record is required to prove the oral direction of the barrister: *Dyson* v. *Wood* (4) shews that the judgment of a Court need not be proved by writing. The High Court of Justice and the Court of Appeal have power to direct that the order of the barrister shall be amended if it is a record: *Williams* v. *Lord Bagot.* (5) It is not too late to amend even at this stage of the proceedings: *Mellish* v. *Richardson.* (6)

[COTTON, L.J. Surely the order of the barrister ought to have

(1) 8 Q. B. D. 339.
(2) 23 W. R. 138.
(3) 3 C. & K. 307.
(4) 3 B. & C. 449.
(5) 4 D. & R. 315.
(6) 7 B. & C. 819.

been amended before the trial of the issues arising out of the mandamus: this is an application to us to alter the evidence adduced before the jury.]

A record may be altered so as to make it correspond with the true state of the facts: *Ernest* v. *Brown* (1); *Reg.* v. *Fall* (2); *Marianski* v. *Cairns.* (3)

But further, the Commissioners of the Treasury issued certificates which they afterwards cancelled; these certificates were judicial acts, or at least in the nature of awards: it was not competent to the commissioners after cancelling them to issue a fresh certificate: they have no power to make a certificate from time to time.

[BRETT, L.J. Were not the defendants liable before the certificates were issued? The certificates merely ascertained the amount to be paid.]

A certificate is a condition precedent to the liability to pay: Corrupt Practices (Municipal Elections) Act, 1872, s. 22.

The issuing of the mandamus is in the discretion of the Court, and in such a case as the present the Court as a matter of discretion ought not to order the mandamus to issue; under the Municipal Corporations Act, 6 & 7 Wm. 4, c. 76, s. 92, the town council have no power to make a retrospective rate: *Woods* v. *Reed.* (4)

[JESSEL, M.R. It does not follow that a retrospective rate would be bad under the Corrupt Practices (Municipal Elections) Act, 1872, s. 22.]

Owing to the lapse of time, the ratepayers of the borough have changed, and the Court has a discretion to refuse a mandamus where it is inequitable to grant it: *Reg.* v. *Garland.* (5)

[JESSEL, M.R. In *Reg.* v. *Wigan* (6) it is pointed out by Lord Chelmsford that where a peremptory writ of mandamus is granted, the matter is not one of discretion, but of legal right.]

Possibly a mandamus may be granted notwithstanding great delay, where that delay has not been undue and is excusable: *Worthington* v. *Hulton* (7); but in the present case the Commis-

(1) 4 Bing. N. C. 162.
(2) 1 Q. B. 636.
(3) 1 Macq. H. L. Sc. 212, 766.
(4) 2 M. & W. 777.
(5) Law Rep. 5 Q. B. 269.
(6) 1 App. Cas. 611, at p. 620.
(7) Law Rep. 1 Q. B. 63.

1882

THE QUEEN v. MAYOR OF MAIDENHEAD.

sioners of the Treasury have assigned no reasonable ground for the delay in applying for the mandamus.

Sir H. James, A.G., and *A. L. Smith*, for the prosecutors, were not called upon to argue.

JESSEL, M.R. I have twice read through the judgment delivered by Pollock, B. (1) in the Queen's Bench Division; it was assented to by Lord Coleridge, C.J., and therefore it forms the judgment against which the present appeal is brought. I will proceed to deal with the points which are noticed in it.

The first point to which I shall refer depends upon the construction of the sections as to the election court; it has been argued that it is not a court of record; but s. 14, sub-s. 5, of the Corrupt Practices (Municipal Elections) Act, 1872, enacts that the court shall have the same powers and privileges, which a judge has on the trial of an election petition under the provisions of the Parliamentary Elections Act, 1868. By s. 29 of this latter statute the court held by a judge at the trial of a parliamentary election petition is expressly declared to be a court of record. The effect of the two sections read together is to make the court for the trial of a municipal election petition a court of record with all the powers and privileges belonging to it. The right to commit to prison and to inflict fines is an incident to every court of record, and this right is plainly recognised by s. 14, sub-s. 5 of the Corrupt Practices (Municipal Elections) Act, 1872, which empowers the superior Court or a judge to discharge or vary any fine or order for committal. It is very clear that the court for the trial of a municipal election petition is a court of record, and this point must be determined adversely to the defendants.

Then are the Commissioners of the Treasury entitled to recover? Issues of fact were tried, and the jury was of opinion that there was sufficient evidence that the barrister did order the whole of the costs to be paid by the respondent Dawson; this finding has not been challenged, and must be adopted as a correct statement as to the barrister's verbal order. But then the question arises whether oral evidence can be admitted, and I think that what the

(1) 8 Q. B. D. at p. 346.

barrister said, besides the directions contained in the written order of the 11th of March, 1875, must be excluded. It was contended that there might be an amendment of that order. A court of review or error has power to amend according to certain ancient statutes; and no doubt there was a power to amend in the election court, but that court ceased to exist upon the conclusion of the business before it. Possibly the superior Court may have power to amend; the inclination of my mind is that it can amend when an order of the election court is properly brought before it; I think that the superior Court has that power under the provisions of the Corrupt Practices (Municipal Elections) Act, 1872, and especially under s. 21, sub-s. 5; for an election petition is a cause within its jurisdiction. At least this is my present impression. But whether the power to amend does or does not exist, it is plain that the defendants have no remedy in these proceedings upon appeal to this Court; for the respondent Dawson, whom it was intended to render liable to these costs, is not a party to this mandamus, and he is a necessary party to any proceedings by which he can be ordered to pay costs. This consideration alone shews me that an application to amend cannot be made to this Court upon these proceedings. It was said by Pollock, B. (1), that the letter of the barrister, dated the 27th of September, did not authorize an amendment, it being a mere expression of intention upon his part. I am unable to dissent from the reasoning of Pollock, B., as to this point; I think that apart from the circumstance that Dawson was not a party, the application to amend was properly refused upon the grounds there stated. The case was tried in a manner open to observation; I am not satisfied with the manner of the trial and with the finding of the jury. The issues of fact were really tried to determine what was said by the barrister in delivering judgment. As I have before intimated, the contemporaneous record of the 11th of March, 1875, does not shew that the barrister ordered that the expenses of receiving the court, and also the allowances, remuneration, and expenses to be paid in respect of the trial of the petition should be borne by Dawson, and yet many persons were called as witnesses, who stated according to their recollection what passed when the barrister delivered

(1) 8 Q. B. D. at page 353.

1882

THE QUEEN v. MAYOR OF MAIDENHEAD.

Jessel, M.R.

judgment. Without saying that the finding of the jury was wrong in point of law, I cannot make up my mind that it was right in point of fact.

As no valid and proper application has been made to amend the order of the 11th of March, 1875, as drawn up, the inhabitants of the borough remain ultimately liable to defray the allowances, remunerations, and expenses payable to the barrister, officers, clerks, and others, and the necessary funds must be raised by means of a rate. It has been contended that no authority exists for making a retrospective rate; I agree that under s. 92 of the Municipal Corporation Acts, 5 & 6 Wm. 4, c. 76, no authority of that kind exists; but the Commissioners of the Treasury are bound to do everything to obtain reimbursement for the sums paid by them, and I agree that a borough rate made for the purpose of complying with the provisions of ss. 20 and 22 of the Corrupt Practices (Municipal Elections) Act, 1872, must from its very nature be retrospective. I think that this contention fails the defendants.

The last question is whether a peremptory writ of mandamus ought as a matter of discretion to be granted, and the answer depends upon two points. First, it has been contended that the original certificates had been cancelled and therefore were of no effect, and that the second certificate could not be acted upon. I think that this argument is not well founded. Why should not the Commissioners of the Treasury cancel the original certificates? If they could the second is valid; if they could not cancel the original certificates, the certificate of a subsequent date would not affect them. The Commissioners of the Treasury have not by their acts disentitled themselves to this mandamus. Secondly, it was argued that the ratepayers in the borough have changed, and that the commissioners have become disentitled to repayment by reason of delay. I do not think that a sufficient reason. It is a mere accident whether one of the Queen's subjects is a ratepayer. When a man becomes a householder in a borough he is liable to be assessed to the rates, and as a ratepayer he takes his chance as to what burdens are imposed upon the borough. The inhabitants of the borough of Maidenhead must pay the amount claimed. Our decision does not inflict any real injustice.

I wish to say a few words as to appeals from the exercise of a discretion. Whatever the law may have been before the Supreme Court of Judicature Acts, 1873, 1875, the exercise of discretion is now the subject of appeal. It has been truly said that a very strong case must be made out before the exercise of discretion can be overruled; the Court of Appeal must be satisfied that it has been wrongly exercised. I think that the discretion of the Queen's Bench Division has been rightly exercised in the present case. This appeal must be dismissed.

BRETT, L.J. In this case a mandamus has been granted, and a return has been made. The issues of fact have been tried before Mellor, J., and the jury has found that there was sufficient evidence that Mr. Coleman did order Mr. Dawson to pay the whole of the costs. Upon these proceedings we must take it that this was a correct finding. I will assume that if a valid order has been made upon Dawson to pay costs, the borough is not bound to pay them; it is unnecessary to decide otherwise. It appears to have been held in the Queen's Bench Division that as matter of law the inhabitants of the borough must be deemed to be liable to repay the Commissioners of the Treasury; and no doubt it may be argued with great force that the jury was not at liberty to find against the written order of the barrister. For the defendants it has been urged that the court for the trial of a municipal election petition is not a court of record. I think that it is made a court of record by the Corrupt Practices (Municipal Elections) Act, 1872, s. 14, subs. 5, which in effect incorporates the Parliamentary Elections Act, 1868, s. 29. It is necessary that the judgment or order of the barrister should be in writing; and the jury upon the trial of the issues of fact cannot lawfully find against it, notwithstanding his verbal order. I do not think that the written order of the 11th of March can be amended; it is not a record drawn up by the officer of the court; it is an order signed by the barrister himself. It may be that the order might be amended by the superior Court; but after the proceedings at the trial of the election petition had been concluded and the certificates had been sent to the superior Court, the barrister himself could not amend it because he was functus officio; after he had

1882

THE QUEEN v. MAYOR OF MAIDENHEAD.

Brett, L.J.

quitted the borough upon the discharge of his duties, it seems to me that he could not amend it. If the question as to the form of the order had been brought before the Superior Court either by way of appeal (if there is an appeal) or upon motion, the superior Court might have amended it. But these proceedings are taken to enforce the claim of the Commissioners of the Treasury, and the order or judgment of the election court cannot now be amended by any Court. As the order has not been amended, the inhabitants of the borough must pay.

It has been urged that the inhabitants of the borough ought not to be called upon to pay, because the original certificates of the Commissioners of the Treasury have been cancelled, and a second certificate has been issued, and the second certificate cannot be enforced. I see no reason for declining to enforce the certificates. It has been urged that a certificate of the Commissioners of the Treasury must be deemed to be an award or a judgment. I am of a different opinion; and I agree with the majority of the Queen's Bench Division that it is not an award or a judgment. There is no judicial act, no judicial interference with the property of the Queen's subjects. The Commissioners of the Treasury are at liberty to cancel their certificates.

It has been argued that the Queen's Bench Division ought not to have allowed the mandamus to issue, because it will order to be done what is illegal, namely, a retrospective rate to be levied. As a general rule, a retrospective rate is illegal; but here the question is whether the Corrupt Practices (Municipal Elections) Act, 1872, s. 22, does not empower the corporation to make a retrospective rate. Payment is to be made out of the borough rate; from its very nature the rate must be retrospective, because the inquiry before the barrister has been closed before the time when it is made. I think that the legislature intended that the rate should be retrospective.

It has been argued also that to grant the mandamus will inflict hardship, owing to the delay which has taken place in applying for it. I think that there has been no unreasonable delay. The proceedings are the result of the mistake of the barrister, Mr. Coleman, in drawing up the order of the 11th of March, 1875; the Commissioners of the Treasury were guilty of no undue delay

in discovering the mistake. If there had been an unreasonable delay, the Queen's Bench Division might have refused to allow the mandamus to issue; but I think the majority of the judges right in overruling the argument as to delay.

I wish to state my opinion that by the Supreme Court of Judicature Acts, 1873, 1875, power to review the exercise of a judicial discretion is given; we are bound to ascertain whether it has been properly exercised; but I think that there has been no error in exercising it, and that the judgment of the Queen's Bench Division was right.

COTTON, L.J. I am of the same opinion. The main question arises upon the order of the barrister as to costs. I shall assume that the court for the trial of a municipal election petition is a court of record, and I will discuss the power and the propriety of amending the barrister's order upon the facts before us. I am not inclined to amend; this case differs from *Williams* v. *Lord Bagot*. (1) In that case the Court of King's Bench had the record before it, and it was necessary that the Court should see that the record was actually made and rightly made; but in the present case this order of the barrister or record is only incidentally before us; it is only a matter of evidence incidentally introduced in ascertaining the liability of the defendants; in such a proceeding as this no alteration can be made.

It has been argued that as the original certificates were withdrawn, no fresh certificate could be issued. A certificate by the commissioners merely shews what payments have been made; it is not a judicial order, it is merely a document which the Commissioners of the Treasury were authorized by statute to issue.

A legal liability was imposed upon the inhabitants of the borough, as is plain from the reasons which I have stated. But it has been argued that as a matter of discretion the writ of mandamus ought not to be granted. In my opinion the discretion of a Court ought to be exercised in the same manner, as it was exercised in the Court of Chancery when it had to decide whether a plaintiff was entitled to an injunction. In the present case the issues have been tried, and the legal proceedings have come to a

(1) 4 D. & R. 315.

1882

THE QUEEN v. MAYOR OF MAIDENHEAD.

Cotton, L.J.

hearing: a much stronger case was required at the hearing to deprive a plaintiff of his right to an injunction than upon an interlocutory application. In the present case the mandamus is claimed in order to compel the corporation of Maidenhead to put itself into funds to discharge the liability devolving upon it. It ought to be a strong case to induce us to refuse it. The only real ground of objection is delay; and the delay is not sufficient to enable us to abstain from granting the mandamus.

Judgment affirmed.

Solicitors for prosecutors: *Hare & Co. for the Solicitor to the Treasury.*

Solicitor for defendants: *C. J. Mander.*

J. E. H.

May 1.

[IN THE COURT OF APPEAL.]

THE PRISON COMMISSIONERS *v.* THE CLERK OF THE PEACE FOR MIDDLESEX.

Prison—Land bought for the purpose of rendering Prison more commodious or safe—Prison Commissioners—Prison Act, 1865 (28 *&* 29 *Vict. c.* 126), *ss.* 4, 5, 8, 23, 44—*Prison Act*, 1877 (40 *&* 41 *Vict. c.* 21), *ss.* 5, 48, 60—*Evidence—Sale of Land—Intention of Parties to Conveyance.*

In 1867 the Justices of the county of M. bought land covered with houses subject to leases for long terms, several years of which remained unexpired. The land and the houses were conveyed to the clerk of the peace for the county, "upon trust for the Justices of the county of M., for the purposes of the Prison Act, 1865, and upon or for no other trust, intent, or purpose whatsoever." The land and houses were never used as part of the prison. An action having been brought to try whether the reversion in the land and houses was in the Prison Commissioners or the justices, the defendant proposed to adduce as evidence the minutes of the proceedings of the justices in order to shew that the land had been bought for the purpose of rendering the prison more commodious or safe:—

Held, that the reversion in the land and the houses standing thereon had passed to the Prison Commissioners by virtue of the Prison Act, 1877.

Per Jessel, M.R., that the conveyance having been executed, the minutes of the proceedings of the justices were inadmissible as evidence shewing the purpose for which the land and the houses had been bought.

THIS action was commenced on the 26th of May, 1880, and was brought in substance to try whether the reversion in certain land subject to leases was in the plaintiffs or the defendant.

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

The land in dispute was covered with twenty-five houses, and was contiguous to Coldbath Fields Prison in the county of Middlesex; the houses were known as Nos. 1 to 10 Oldham Place, and 1 to 15 Oldham Gardens, Coldbath Fields. The Justices for the county of Middlesex in Quarter Sessions assembled had contracted to buy the land and the houses thereon, and the same were conveyed to the defendant as Clerk of the Peace for Middlesex, by indenture dated the 20th of February, 1867. The houses were subject to certain leases for long terms, of which several years remained unexpired. According to the minutes of the proceedings of the justices, the land and the houses thereon had been bought for the purpose of rendering Coldbath Fields Prison more commodious and safe. The plaintiffs were the Prison Commissioners appointed under the 6th section of the Prisons Act, 1877, and they contended that the land and houses were bought by the justices for the purpose of enlarging or altering Coldbath Fields Prison, or adding to the appurtenances thereof, within the true intent and meaning of the Prison Act, 1877.

The material parts of the indenture dated the 20th of February, 1867, were as follows:—"And whereas the said Henry Fitzherbert Stroud, Thomas Challis, Benjamin Cooke, James Haycroft, and Henry Allon, as such trustees as aforesaid, acting under the powers of the Prison Act, 1865, and of the Acts incorporated therewith, lately contracted and agreed with the said Richard Nicholson (who was duly authorized in that behalf by the Justices of the said county of Middlesex in Quarter Sessions assembled, acting under the powers vested in them by the said Prison Act, 1865, and the Acts incorporated therewith,) for the absolute sale to him of the pieces or parcels of ground . . . . hereby granted and conveyed . . . . subject as to part of the hereditaments secondly hereinafter described to the subsisting tenancies and to the several leases thereof specified in the 1st Schedule hereunder written, but free from all other incumbrances at or for the price or sum of 16,350*l.* And whereas in pursuance of the provisions of the said Prison Act, 1865, with which is incorporated the Lands Clauses Consolidation Act, 1845, and the Act amending the same, the said purchase-money or sum of 16,350*l.* has been paid by the said justices into the Bank of England, in the name and with the

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

privity of the Accountant General of the Court of Chancery, and to an account entitled, 'Ex parte the Justices of the County of Middlesex in the matter of the Prison Act, 1865,' and the said justices have obtained for such payment the receipt of one of the cashiers of the said bank, and the certificate of the said Accountant General. Now this indenture witnesseth that in pursuance of the said recited agreement, and in consideration of the said sum of 16,350*l.* so paid into the Bank of England as aforesaid, the payment of which said sum of 16,350*l.*, the said Henry Fitzherbert Stroud, Thomas Challis, Benjamin Cooke, Thomas Haycroft, and Henry Allon, do hereby respectively acknowledge, and from the same and every part thereof, do hereby respectively release and discharge the said justices and also the said Richard Nicholson and his successors, they the said Henry Fitzherbert Stroud, Thomas Challis, Benjamin Cooke, James Haycroft, and Henry Allon, by force and virtue and in exercise and execution of the powers and provisions of the Prison Act, 1865, and of the Acts incorporated therewith, do and each and every of them doth by these presents grant and convey unto the said Richard Nicholson, his successors and assigns, first all that piece or parcel of ground . . . . To have and to hold . . . . (subject as to part of the hereditaments secondly hereinbefore described to the subsisting tenancies and to the said several leases thereof specified in the said 1st Schedule hereunder written, but free from all other incumbrances), unto the said Richard Nicholson, his successors and assigns, to the use of the said Richard Nicholson, his successors and assigns for ever. Upon trust for the Justices of the said county of Middlesex for the purposes of the Prison Act, 1865, and upon or for no other trust, intent, or purpose whatsoever."

The action came on to be tried before Lord Coleridge, C.J., and a special jury, but the jury were discharged by consent, and the learned judge adjourned the case for further consideration. He ultimately held that the land and houses had been bought by the justices for the purpose of enlarging Coldbath Fields Prison, and directed judgment to be entered for the plaintiffs.

The defendant appealed.

R. E. Webster, Q.C., and *R. S. Wright*, for the defendant. The

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

question is whether the piece of land in dispute, which was purchased in the year 1867 by the Justices of the county of Middlesex, passed under the Prisons Act, 1877, to the Prison Commissioners without the payment of any compensation. It must be admitted by the defendant that if the land was bought for the purpose of enlarging the prison, it did pass to the Prison Commissioners, but in point of fact it was bought for other purposes and therefore did not pass to them. It has not been used for the purposes of the prison, it being subject to leases which are as yet unexpired. It was bought for the purpose of rendering the prison more commodious or safe, as the justices wished to have a control over the tenants of the houses built upon the land; it was no part of the scheme that the land should be bought for the purpose of enlarging the prison, but any purpose of that kind is distinctly negatived by several minutes of the justices entered both before and after the land was bought.

[JESSEL, M.R. Are those minutes admissible after the deed of conveyance has been executed? In my opinion they certainly are not admissible.]

It is true that the justices had no power to purchase except in relation to the prison; but of course if they bought the land improperly, it would not pass to the Secretary of State or the Prison Commissioners, and the present action must fail. It is material to consider some of the sections of the Prison Act, 1865 (28 & 29 Vict. c. 126). By s. 4 the word "prison" includes "the airing grounds or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto." By s. 5 the justices are to be the prison authority. By s. 8 adequate accommodation for prisoners is to be provided at the expense of every county. By s. 23, "any prison authority may alter, enlarge, or rebuild any of its prisons, or may, if necessary, build other prisons in lieu of or in addition to any subsisting prisons," subject to certain restrictions contained in the following sections. By s. 44, any prison authority may purchase and hold land required for the purposes of the Act, and the Lands Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, are incorporated. Sect. 44 contains certain exceptions, of which the third is that "the prison authority shall not, except in

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

respect of lands contiguous to a prison, and required for the purpose of enlarging a prison or rendering it more commodious or safe, put in force the provisions of the said incorporated Acts with respect to the purchase of land otherwise than by agreement." These words allowed the justices to buy lands contiguous to the prison, which were required for the purpose of enlarging it, or rendering it more commodious or safe.

[JESSEL, M.R. Can an exception of that kind confer a power? Can there be any power to purchase for the purpose of making the prison more commodious or safe except under the terms of s. 23?]

Land may be bought merely for the purpose of rendering the prison more commodious or safe; for it cannot be illegal to do that by agreement which can be done compulsorily. Sects. 8 and 44 confer the power to buy lands; s. 23 was intended to limit the power of the justices as to altering, enlarging, or rebuilding a a prison. It would be a hardship, if the Prison Commissioners without paying compensation should get the benefit of land bought with money taken out of the county rate with a view to the interests of the county in the future. The land in dispute was bought, no doubt, for the purposes of the prison, but not for any of the purposes which under the Prison Act, 1877, s. 5, pass the property therein to the Secretary of State.

[BRETT, L.J. It would be a strange result, if one part of the land held for the purposes of the prison should pass to the Secretary of State or the Prison Commissioners, and if another part should remain vested in the clerk of the peace in trust for the justices. Surely this is an action by cestui que trusts against their trustee.]

It was not intended to pass to the Secretary of State or the Prison Commissioners land not used as part of the prison, unless it was bought for the purpose of enlarging or altering the prison or adding to the appurtenances of it, as mentioned in the Prison Act, 1877, s. 60. It is not land belonging to the prison within the meaning of the Prison Act, 1877, s. 48, for it has never been appropriated to the use of the prison, although no doubt it may hereafter be included within the prison walls, if occasion should hereafter arise; but that occasion may never happen. The duty

of providing prisons is an obligation of the common law, and it is impossible to suppose the Prison Act, 1865, ss. 23, 24, was intended to enumerate and exhaust all the powers of the prison authority. The duty by the rules of the common law is not merely to build and enlarge a prison, but also to do what is reasonably necessary for the maintenance and safety of the prison. The Prison Act, 1865, s. 44 gives a general power to buy land for any purpose connected with a prison, and the Prison Act, 1877, s. 48, applies only to cases where the land has been actually appropriated to the use of the prison.

Sir H. James, A.G., and *Sir F. Herschell, S.G.* (*A. L. Smith*, with them), for the plaintiffs, were not called upon to argue.

JESSEL, M.R. I think we need not trouble the Attorney General. The question is really as to the construction of the Acts of Parliament. The conveyance, in my opinion, is conclusive as to the rights of the parties, and renders it improper for us to consider what resolutions were passed by the justices before the execution of it, because the justices, by the clerk of the peace, were parties to the conveyance, and the law is that whatever the negotiations may be that precede the purchase, still the parties to the conveyance are bound by it: they may have changed their mind but the execution is enough to bind them: the justices approved of the conveyance and were the real parties to it, and that is the only document to which we can look in order to see what the title of the clerk of the peace, the nominal defendant, is to the land in question. The deed, in the most express terms, recites that the land was bought for the purposes of the Prison Act, 1865, and the actual words of the recital are that the vendors "acting under the powers of the Prison Act, 1865, and of the Acts incorporated therewith, lately contracted and agreed with the said Richard Nicholson, who was duly authorized in that behalf by the justices of the said county of Middlesex in quarter sessions assembled, acting under the powers vested in them by the said Prison Act, 1865, and the Acts incorporated therewith." Then there is a recital that in pursuance of the provisions of the Prison Act, 1865, the said purchase-money has been paid, and also a grant whereby the land is conveyed to the clerk of the peace, "To

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

Jessel, M.R.

have and to hold the said pieces or parcels of ground, messuages, or tenements, buildings, and all and singular other the premises hereby granted and conveyed, or intended so to be, with their and every of their rights, members, and appurtenances (subject as to part of the hereditaments secondly hereinbefore described to the subsisting tenancies and to the said several leases thereof specified in the said first schedule hereunder written, but free from all other incumbrances) unto the said Richard Nicholson, his successors and assigns, to the use of the said Richard Nicholson, his successors and assigns for ever, upon trust for the justices of the said county of Middlesex for the purposes of the Prison Act, 1865, and upon or for no other trust, intent, or purpose whatsoever." Now for what purpose could the justices buy under the provisions of the Prison Act, 1865? It appears to me quite plain that the purposes for which they can buy land are pointed out in the 23rd section of the Act. It does not much matter whether the construction which I put upon the section is right or wrong, because whether it be right or wrong, there is another way of arriving at the same conclusion. The wording of the section is "Subject to the conditions hereinafter mentioned any prison authority may alter, enlarge, or rebuild any of its prisons, or may, if necessary, build other prisons in lieu of or in addition to any subsisting prisons;" that is subject to the sanction of the Secretary of State in certain cases. Under the 44th section it is provided that "any prison authority may purchase and hold such lands or easements relating to lands as they may require for the purposes of this Act; and to facilitate such purposes the Lands Clauses Consolidation Act, 1845, and the Act amending the same passed in the session of the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter 106, shall be incorporated with this Act." The Lands Clauses Act is thus incorporated, but an exception is added as to compulsory purchase which has been largely argued upon, but which I think is wholly immaterial. However I will read it. "The prison authority shall not, except in respect of lands contiguous to a prison, and required for the purpose of enlarging a prison or rendering it more commodious or safe, put in force the provisions of the said incorporated Acts with respect to the purchase of land otherwise than by agreement." Now, as I read

that exception, it does not affect the power of purchasing land by agreement: the power of purchasing land by agreement is simply for the purposes of the Act. But it was said that these words "or render it more commodious or safe" imply a power to buy land for those purposes, although it may not be required for enlarging, altering, or rebuilding a prison, or building a new prison under s. 23; in other words, that an implied power is given by the restrictive words; but I think there is no such implied power. The section gives a power to buy compulsorily, and the restriction is merely in favour of the landowner. Land may be bought for any of the purposes of the Act by agreement, but if the prison authority want to buy without agreement, that is compulsorily, they can buy only for one of two purposes, that is, either for enlarging the prison or for rendering it more commodious or safe. That does not mean that the prison authority can buy compulsorily for any purpose of the Act. They cannot buy compulsorily even for building a new prison, they cannot buy compulsorily for altering or rebuilding a prison, unless they can shew that the land is required for the purpose of rendering it more commodious or safe. For enlarging they can buy. The result, therefore, is that in my opinion this exception in the 44th section has no bearing upon the question which we have to consider, that question being simply this, whether land can be bought by a prison authority for any other purposes than those mentioned in the 23rd section. In my opinion land cannot be bought for any other purpose. It has been argued that there is another purpose of the Act, that these prison authorities are by the common law entitled to erect and maintain prisons, and that an obligation is imposed upon them to provide sufficient prison accommodation, and that, therefore, for the purposes of the Act they exercise an authority given by the common law. I think that is not so. The rule is that where an authority is possessed at common law by any body, and statutory authority is conferred on the same body for the same object but with restrictions, it negatives the authority at common law. If a power to build a prison had existed by the authority of the common law, and the Act had said "subject to the approbation of the Secretary of State in writing," the Act would have directed that a prison shall not be built except with

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

Jessel, M.R.

the sanction of the Secretary of State, and so would have negatived the common law authority. If s. 8 is looked at, it will be seen that it does not deal with an authority at common law: it enacts that at the expense of every county adequate accommodation shall be provided for its prisoners in a prison or prisons constructed and regulated in such manner as to comply with the requisitions of the Act in respect of prisons. Therefore it is not an authority at common law, but a new power. The prison authorities could not build prisons except in such a way as to comply with the requisitions of the Act, and therefore there would be an end of the authority at common law to build prisons in any other way. In my opinion land can be acquired only for one of the four purposes mentioned in s. 23, and if that is so, it appears to me that the 60th section of the Act of 1877 would alone, without anything more, vest this land in the Secretary of State. The words of the 60th section are, "prison, in addition to the meaning attached to it by the Prison Act, 1865, includes any land or building bought or contracted to be bought before the commencement of this Act by a prison authority for the purpose of enlarging or altering any prison, or adding to the appurtenances of any prison, subject to this proviso, that if the Secretary of State is of opinion that any portion of the lands so bought or contracted to be bought, whether included or not within the walls of the prison, was not at the time of the passing of this Act necessary for the then subsisting purposes of such prison, he shall either direct that such portion shall be reconveyed to the prison authority, or retain such portion or any part of such portion on payment out of moneys provided by parliament" of a sum to be ascertained. The land in dispute could not be bought for rebuilding, because the prison is upon the same site, and therefore if the land was bought for the purposes of the Act as additional land, it could only be bought for the purpose of enlarging or altering the prison; one of the three sets of words must catch it, if it was bought for any one of the purposes named in the 23rd section, altering, enlarging, or rebuilding; and consequently those words would pass the land to the Secretary of State, subject to his giving back the land if it is not wanted, upon which he must exercise his own discretion.

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

Jessel, M.R.

But even if all that I have said is erroneous, and even if it was possible under the Prison Act, 1865 for the justices to buy the land to make the prison more commodious or safe, without its being required for the purpose of enlarging, altering, or rebuilding, it appears to me that the 48th section of the Prison Act, 1877, applies. The words of that section appear to me to comprise this land, and I do not see what other kind of land they can comprise. The wording of the section is, "The legal estate in every prison to which this Act applies, and in the site and land belonging thereto, and in the furniture and effects, shall, on and after the commencement of this Act, be deemed to be vested in the Prison Commissioners, and not in the Secretary of State, but shall from time to time be disposed of by such commissioners in such mode as the Secretary of State, with the consent of the Treasury, may direct." What does that mean? Why, the prison itself, which includes under the definition clause of the Prison Act, 1865, airing grounds or other grounds occupied by the officers; everything appropriated and used as part of the prison is included in the word "prison." What do the words, "and in the site and land belonging thereto" apply to? Certainly it catches this land, because it belongs to the prison. It is vested in the clerk of the peace for prison purposes; and if the land was bought for the purpose of making the prison more commodious or safe, which is the chief object to be looked after as regards the prison, surely it is land belonging to the prison, that is to say, it is land vested in the prison authority for prison purposes, and it therefore passed. In either view therefore the decision of the Court below is right, and in my opinion this appeal must be dismissed with costs.

BRETT, L.J. The Lord Chief Justice held as a matter of fact that this land was purchased by the clerk of the peace and the justices for the purpose of enlarging the prison, and it is admitted that if he was right in point of fact in that finding the appellant here, the defendant below, must fail. I am not in the least prepared to say that the Lord Chief Justice was wrong in that finding, but it seems to me to be immaterial whether he was or was not, for the purpose of deciding this case. The defendant, the clerk of the peace, acting by the authority of the justices, who

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

Brett, L.J.

were at that time the prison authority, bought this land. By the terms of the deed of conveyance it was declared that the land was bought for the purposes of the Prison Act, 1865, that it was required for some purpose of the prison, and in that very deed of conveyance it was declared that it was bought and held in trust for prison purposes. It may be that there is no estoppel in law between the justices and the present plaintiffs, because there is no contract between them and the present plaintiffs, and that there is nothing upon which to raise an estoppel; but it seems impossible to suppose that the justices, having expended the money of the county in the purchase of this land expressly for a given purpose, could have been heard in any court to say that they did not buy this land for the purposes declared in the deed of conveyance under which they took it. As might naturally be expected, it is not argued on their behalf that they did not buy the land for prison purposes; it is admitted now in argument that they did, but the argument is that although they bought it for prison purposes, there are some prison purposes for which they could rightly buy it and rightly hold it, yet under which it does not pass by force of the Prison Act, 1877, to the Prison Commissioners. It seems to me that that argument is wholly untenable. It seems to me that the argument and the whole decision of this case depend, not upon the construction of the Prison Act, 1865, but solely upon the construction of the Prison Act, 1877, and it seems to me that the words of the Prison Act, 1877, are carefully made as large as they can be for the purpose of transferring to the commissioners mentioned in the Prison Act, 1877, every piece of land bought by the justices under the Prison Act, 1865, for any prison purpose, and it is not true to say that there are some pieces of land which they could properly buy under the Prison Act, 1865, which nevertheless they can keep from the Prison Commissioners. It seems to me that the words of ss. 5, 48, and 60, of the Act of 1877 are made expressly and purposely larger if possible than the words of the Act of 1865, in order to get rid of any such argument as has been urged before us to-day.

COTTON, L.J. There has been considerable argument before us upon the Acts of Parliament for the purpose of finding out what

1882

PRISON COMMISSIONERS v. CLERK OF THE PEACE FOR MIDDLESEX.

Brett, L.J.

land comes within s. 60 of the Prison Act, 1877. The only question which we have to determine is this, whether the land in dispute has been transferred to and is now vested in the Prison Commissioners, who are respondents here. Sect. 60 does not vest anything in them, it only gives a new definition of prison, enlarging the definition of "prison" contained in the previous Act. The section which we have to look to is s. 48 of the Prison Act, 1877, and that vests in the Prison Commissioners the prison and "the site and land belonging thereto." If the construction put upon s. 60, and the facts found by the Lord Chief Justice are right, under the term "prison;" the land will vest in the Prison Commissioners, but it is not necessary to decide that question. By s. 48, besides the legal estate in every prison to which this Act applies, the site and land belonging thereto are vested in the commissioners, and in my opinion it must be held that this is "land belonging" to the prison. The land spoken of in this section must mean land not coming within the definition of "prison," but belonging to it for the purposes of the prison. This land was bought by the justices and conveyed to a trustee for the purposes of the Prison Act, 1865. It must, in my opinion, if it is not land which comes under the definition of "prison," be land belonging to the prison within the meaning of s. 48, and therefore must, in my opinion, pass to and be vested in the Prison Commissioners.

Judgment affirmed.

Solicitors for plaintiffs: *Hare & Fell, for the Solicitor to the Treasury.*

Solicitors for defendant: *Nicholson & Herbert.*

J. E. H.

1882
May 22.

THE LOCAL BOARD FOR THE DISTRICT OF BEXLEY *v.* THE WEST KENT MAIN SEWERAGE BOARD.

West Kent Main Sewerage Act, 38 & 39 *Vict. c. clxiii.—Construction of* s. 93—*Arbitration—Submission—Jurisdiction of High Court.*

The West Kent Sewerage Board is incorporated by a local Act of 38 & 39 Vict. c. clxiii., and by s. 93 it is enacted that, if any difference arises between the board on the one hand and any constituted authority or person on the other hand, or between any two or more constituted authorities, or between any constituted authority and any parish or person, respecting any assessment of a main sewer rate, or any determination of the board, or any controversy or other matter under the Act, the same shall by virtue of the Act stand referred for decision to the Local Government Board, whose decision thereon and respecting the costs of the reference shall be final and binding.

A dispute having arisen between the West Kent Sewerage Board and the Bexley Local Board respecting a claim made by the local board against the sewerage board for compensation for damage done to the highways, &c., of the district, the disputants, with the consent of the Local Government Board, stated a case for the opinion of this Court:—

Held, that it was not competent to them to do so, the Local Government Board being by s. 93 constituted the tribunal whose decision on the matter was to be final and binding, and this not being a submission to arbitration within s. 5 of the Common Law Procedure Act, 1854.

CASE stated by the Bexley Local Board and the West Kent Sewerage Board, with the assent and sealed with the seal of the Local Government Board, for the opinion of this Court:—

1. The local board for the district of Bexley, under and by virtue of the local government Acts and the Public Health Act of 1875 (38 & 39 Vict. c. 55), are surveyors of the high roads in and for the district of Bexley.

2. The West Kent Main Sewerage Board are incorporated under and by virtue of an Act of Parliament, 38 & 39 Vict. c. clxiii., intituled "An Act for making better provision for the sewerage by means of main sewers of parts of the lathe of Sutton-at-Hone, in the county of Kent," for the purpose of constructing a sewer and other drainage works in (amongst others) the parish of Bexley.

3. By s. 8 of that Act it is enacted that "the board, in making their sewers and filtering bed may from time to time, as far as they find it necessary or convenient for effecting the objects of the works, break up, cross over or under, or stop up temporarily or

permanently, any street, highway, path, sewer, drain, creek, and watercourse, and any pipe or tube for water, gas, telegraph, or other purposes, doing as little damage as may be, and making compensation for any damage done."

4. The local board having made a claim against the sewerage board for compensation under the last-mentioned section, the sewerage board disputed their liability to pay any such compensation, and under the provisions of s. 93 of the Act (1) the matters in difference stand referred to the Local Government Board.

5. During the course of the reference evidence was given on behalf of the local board in support of certain heads of their claim which the sewerage board disputed their liability to pay even if the evidence was well founded.

The case then set out the disputed heads of claim.

The question for the opinion of the Court was whether the sewerage board were liable to pay compensation to the local board for any and what part of the damage claimed, under any and which of the heads therein mentioned.

H. T. Atkinson, for the plaintiffs.

[MANISTY, J. What power has the Local Government Board to state this case? They are by s. 93 of 38 & 39 Vict. c. cxliii., constituted the tribunal by which these disputes are to be heard and finally decided.]

The Local Government Board, like any other arbitrators, may state a case for the opinion of the Court under the 5th section of the Common Law Procedure Act, 1854.

[MANISTY, J. I very much doubt that. That section applies only to compulsory references under the Act or to references by

(1) Sect. 93 enacts that, "Except as in this Act expressly otherwise provided, if at any time any difference arises between the board on the one hand and any constituent authority or authorities or persons or person on the other hand, or between any two or more constituent authorities, or between any constituent authority and any parish or part of a parish or persons or person, respecting any assessment of a main sewer rate, or any injunction, notice, or any determination of the board, or any controversy or other matter under this Act, the same shall by virtue of this Act stand referred for decision to the Local Government Board, whose decision thereon and respecting the costs of the reference shall be final and binding."

1882

BEXLEY LOCAL BOARD v. WEST KENT SEWERAGE BOARD.

consent of parties where the submission is or may be made a rule of Court.]

Sect. 5 has been held to apply to references under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18: *In re Dare Valley Ry. Co.* (1); *In re Harper* (2); *Rhodes* v. *Airedale Drainage Commissioners.* (3) This last case, if it does not overrule, is inconsistent with, *In re Dare Valley Ry Co.* (1)

[WATKIN WILLIAMS, J. Under the Lands Clauses Consolidation Act the reference is voluntary. But under this Act the authority of the Local Government Board does not arise by consent of the parties.

MANISTY, J. Sect. 25 of the Lands Clauses Consolidation Act, 1845, expressly says that the appointment of the arbitrator is to be "deemed a submission to arbitration on the part of the party by whom the appointment shall be made."]

Bray, for the defendants. Both parties are desirous of having the decision of the Court. This is a reference to arbitration under a private Act of Parliament, and therefore a submission by agreement.

MANISTY, J. I am of opinion that there is no power to state a special case under this Act. The case is stated by two boards, the Bexley Local Board and the West Kent Sewerage Board, with the assent of the Local Government Board testified by their affixing their seal to it. Sect. 93 of 38 & 39 Vict. c. clxiii., enacts that, except as in this Act expressly otherwise provided, if at any time any difference arises between the board (that is, the board incorporated under that Act,) on the one hand and any constituent authority or person on the other hand, or between any two or more constituent authorities, or between any constituent authority and any parish or person respecting any assessments of a main sewerage rate, or any determination of the board, or any controversy or other matter under this Act, the same shall by virtue of this Act stand referred for decision to the Local Government Board, whose decision thereon and respecting the costs of the reference shall be final and binding. The intention of the enact-

(1) Law Rep. 4 Ch. 554. (2) Law Rep. 18 Eq. 539.
(3) 1 C. P. D. 380, 402.

ment was to avoid the litigation and delay of proceedings before the ordinary tribunals of the country, and to make the Local Government Board, which has the means of calling to its aid the highest legal talent, the tribunal to deal with all questions arising under the Act, except those which are expressly excepted. I think we should be defeating that very salutary object, and making ourselves mere assessors to the Local Government Board, if we were to entertain this case. If the Board should exceed its jurisdiction, the remedy is by prohibition, and not by special case. *Rhodes* v. *Airedale Drainage Commissioners* (1) seems to have been in a measure overruled by the Lords Justices on appeal (2): but the ground of the decision in the Court of Appeal seems necessarily to lead to the conclusion that this is not a submission to arbitration within the meaning of the Common Law Procedure Act, 1854. The board has power to finally conclude the matter: we have not.

WATKIN WILLIAMS, J. I am of the same opinion; and my reasons are shortly these. Disputes having arisen between the local board of Bexley and the West Kent Sewerage Board as to a claim made by the local board against the sewerage board for compensation for damage done by them to the highways of the district, both parties desire this Court to entertain the question upon a special case stated by them and sealed with the seal of the Local Government Board. Now, the only authority the Court has to entertain a case so stated is derived from s. 5 of the Common Law Procedure Act, 1854, where there has been a compulsory reference under that Act or a reference by consent of parties where the submission is or may be made a rule of a superior Court. It appears to me that this is neither in words nor in substance or sense a reference by consent of parties where the submission can be made a rule of court. The 93rd section of 38 & 39 Vict. c. clxiii. provides that in case of disputes like the present the matter shall by virtue of the Act stand referred to the Local Government Board for decision, and that their decision thereon shall be final and binding. This is therefore a special tribunal selected by the legislature to determine certain differences, with

(1) 1 C. P. D. 380; and see Law Rep. 9 C. P. 508. (2) 1 C. P. D. 402.

1882

BEXLEY LOCAL BOARD v. WEST KENT SEWERAGE BOARD.

a view to avoid the raising of technical objections and the consequent delays of an ordinary reference to arbitration. If we were to entertain this case, we should be inviting consequences which the legislature never contemplated. I further think that the mode of stating this special case is most objectionable. It raises a number of abstract questions without affording the Court any means of dealing with them. It is enough, however, to say that this is not a reference within the Common Law Procedure Act, 1854, and therefore we decline to entertain it.

Case dismissed.

Solicitor for plaintiffs: *Sidney Matthews.*
Solicitors for defendants: *May, Sykes, & Batten.*

J. S.

June 9.

THE QUEEN *v.* THE COOKHAM UNION.

Poor Law—24 & 25 Vict. c. 55, s. 3—"Desertion" of Wife by her Husband—Settlement by Residence—Misconduct of Wife.

By 24 & 25 Vict. c. 55, s. 3, "where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would if she were a widow render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her."

One night in June, 1873, the pauper, a married woman, who had been drinking at a public-house with a man named Wyatt, with whom her husband reasonably suspected her of too much intimacy, came home the worse for drink and found the door of her husband's house locked. She forced her way in; and in the morning, after some words, her husband threatened to lock her in. He then went out to his work, and when he came back he found his wife absent, and that part of his furniture and clothes had been carried away. The pauper took a room elsewhere, and shortly afterwards went away with Wyatt, with whom she lived in adultery until his death in 1879. After Wyatt's death, the pauper wrote to her husband asking him to receive her back. He took no notice of her letter, and if she had gone back to him he would not have received her.

In August, 1881, she became chargeable to the parish of Liverpool as a pauper lunatic, and an order of justices was made for her removal to her husband's parish, which order was confirmed by the quarter sessions. Upon appeal against the last-mentioned order:—

Held, that the above facts disclosed no reasonable evidence of desertion of the wife by the husband, within the statute.

Reg. v. *Maidstone Union* (5 Q. B. D. 31) distinguished.

CASE stated by the quarter sessions of Lancashire, dismissing

an appeal from an order of justices adjudging the settlement of Sarah Cook, a pauper lunatic, to be in the Cookham Union, in the county of Berks:—

1. In August, 1881, Sarah Cook, being found a pauper lunatic within the parish of Liverpool, and not having acquired a settlement in or a status of irremovability from such parish, was, on the 9th of August, 1881, pursuant to statute sent from the parish of Liverpool to the public lunatic asylum of the county of Lancaster; and on the 5th of November, 1881, an order was made by two justices of Lancashire adjudging the settlement of Sarah Cook to be in Cookham, the appellants' union.

2. Notice of appeal against this order was duly given.

3. Sarah Cook was maintained in the asylum at the expense of the select vestry of Liverpool until the end of October, 1881, when she was discharged cured.

4. The pauper lunatic was married to William Cook (who is now living) on the 23rd of May, 1859. They lived together until the 16th of June, 1873, on which date they ceased cohabitation under circumstances hereinafter set out, and have never resumed it.

5. The pauper subsequently resided in the appellants' union from the year 1873 until the year 1880, for such length of time and under such circumstances as would (if she were at and between the dates aforesaid a single woman, or a deserted wife within the meaning of the statutes relating to the settlement and relief of the poor,) have given her a settlement in the appellants' union.

6. The respondents contended and the appellants denied that Sarah Cook was, within the meaning of the statutes aforesaid and for poor law purposes, a deserted wife, and had acquired a settlement in the appellants' union.

7. The parties were unable to agree upon a statement of the facts and circumstances of the cessation of cohabitation between the pauper and her husband; and it was therefore agreed between them that the evidence of the pauper and her husband should be heard by the quarter sessions, the respondents undertaking for this purpose to produce the husband and wife for examination in court.

1882

THE QUEEN v. COOKHAM UNION.

8. The husband and wife were so called and examined and cross-examined before the quarter sessions, and the court of quarter sessions found that the state of things disclosed by the evidence constituted a legal desertion, considering the case to be governed by *Reg.* v. *Maidstone Union* (1), and ordered that the appeal be dismissed with costs; but, as it turned upon a legal question, the court granted a case for the opinion of this Court.

9. The shorthand notes of the evidence (which was the only evidence before the quarter sessions, all other matters being admitted,) were annexed to and to be taken as part of the case.

The questions for the opinion of the Court were,—whether or not in point of law it was competent for the court of quarter sessions, upon and drawing the proper inferences from the evidence adduced, to find that Sarah Cook was within the meaning of the statutes aforesaid and for poor-law purposes a "deserted wife," and had acquired a settlement in the appellants' union, or whether the court of quarter sessions, upon and drawing the proper inferences from the evidence adduced, were bound to find that Sarah Cook was not within the meaning and for the purposes aforesaid a deserted wife, and had not acquired such settlement; and whether the court did draw the proper inferences from the evidence.

If it was not competent for the court of quarter sessions to find in the affirmative, and if they did not draw the proper inferences, and improperly dismissed the appeal, the order of the quarter sessions was to be quashed; if otherwise, to be affirmed.

The Court was to be at liberty to consider and deal with the evidence, and to draw all inferences therefrom which the court of quarter sessions ought to have done.

The evidence was in substance as follows:—

Sarah Cook. I was married to William Cook at Barrow-upon-Humber on the 23rd of May, 1859. I lived with him until June, 1873, in a house at Chelsea. At that time we had a quarrel about a woman named Clegg, a dressmaker. I took to drink. My husband accused me of behaving wrong with a man named Wyatt, a shoemaker; but my husband did wrong first. One night in June, 1873, we had a quarrel about this woman and that man. He did not want to let

(1) 5 Q. B. D. 31.

me in; but I forced the door open. I did not go to bed that night. In the morning, when my husband was going to his work, he said he would lock me in. I said I would knock the door out if he locked me in. During the time my husband was at work, I took part of the things (furniture) away, about half of them. I took a room and put them in it. Before my husband left in the morning to go to his work, he said he would leave me. I lived in lodgings about a fortnight. At the end of that time I went away with Wyatt, and we afterwards lived together in Cookham union, at a place called Dolman's Buildings; and I continued to live with him as his wife until his death, in 1879. After Wyatt's death I wrote a letter to my husband asking him to receive me back, and promising, if he would do so, that the one failing I used to cherish,—viz. the love of drink,—would never occur again. I never got an answer to that letter. After that, I took a situation at Maidenhead, where I stayed about six months. I then made my way to Liverpool. I have never received any assistance from my husband from that time.

On cross-examination she said,—I have never communicated with my husband in any way since 1879. I left him of my own accord, under the circumstances I have stated. I went to live with Wyatt about a fortnight after that. I had never written to my husband before 1879.

William Cook. I was married to the last witness in 1859 at Barrow-upon-Humber. I received the letter referred to in November, 1879. I never answered it. In June, 1873, my wife and I were not living comfortably together. She had fallen into drunken habits; and there was a man named Wyatt, a shoemaker in the neighbourhood, she was in company with very often. I was very much annoyed at that. On the night of the 16th of June, 1873, I came home and found her absent. I went to look for her, and found her drinking with Wyatt in a public-house. I told her that if she liked that man better than me she had better take him. I then went home. My wife came after me. I said nothing that night. In the morning, before I went to work, I spoke to my wife about her conduct. I said she had better stay there until I came home. She said she would be gone before I came home. When I came home she was gone, taking part of the furniture and some of my clothes. I said she had better give the house up, as it was impossible to do anything for her. I had said the same thing to her several times when I tried to persuade her to leave off drinking and stay at home and look after home. When I found she had gone, I took no steps to find her, or try to bring her back. I never saw her afterwards until just now. I went to a sister of my wife's to live. It was five years afterwards before I went to live with the woman Clegg, and have lived with her since as man and wife. I have a child by this woman seven years old. I did not inquire after my wife, because I did not want her back. I took her back once before. In answer to the question, "Supposing she had gone back, would you have received her?" the witness answered, "Never, sir, never no more. I think I have done well."

On cross-examination, he said: I took my wife back once before. She went away of her own accord at that time. I said nothing to her to turn her out. I said, if the house was not good enough for her, she had better leave it. She also went of her own accord the second time. I left her in the house in the morning, and when I came back from my work I found she was gone: she went between breakfast and dinner-time. I did not from 1873 till 1879 know at all where she

1882

THE QUEEN v. COOKHAM UNION.

was; neither did her sister. I was working at the same place until 1877, when the people failed. I then went to the country. That was the place where my wife addressed the letter to me in 1879. She could have found me at any time.

Re-examined. If she had found me I would not have taken her back.

At the close of the evidence, and after hearing counsel, the chairman said,—"The court is not unaminous in this case: but we have determined by a majority that the state of things which has appeared in evidence constitutes a legal desertion of the wife, and consequently the appeal must be dismissed and the order confirmed. We think the case comes sufficiently near that of the Maidstone Union (1) to be governed by it; but, seeing that there is considerable legal difficulty in the case, we are prepared to grant a case."

Lancaster, for the respondents. The question is whether the pauper has been deserted by her husband, within the meaning of 24 & 25 Vict. c. 55, s. 3. (2) That is a question of fact; and, if there was any evidence which ought to have been submitted to a jury, the justices have decided it. The words of the statute have received a judicial construction in *Reg.* v. *Maidstone Union.* (3) Cockburn, C.J., says: "The husband, having discovered that his wife had repeatedly been guilty of adultery, ordered her to leave his house. She did so, and resided apart from him. Now, I cannot think that such a residence can be considered a constructive residence with her husband. Did she, then, reside apart from him under circumstances of desertion? I think we must hold that she did. There was perhaps no desertion in the ordinary acceptation of the word; but the statute must be taken to mean that, where the husband permanently gives up the society of his wife, and continues to live in a different place apart from her, she shall be looked upon as a different person from what she would otherwise be, for, she resides where she does for her own and not for any marital purpose. In the construction of the section it is immaterial whether the husband is misconducting himself, or

(1) *Reg.* v. *Maidstone Union*, 5 Q. B. D. 31.

(2) "Where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would if she were a widow render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her."

(3) 5 Q. B. D. 31.

whether he leaves her in consequence of her misconduct. His residence is no longer connected with hers."

[FIELD, J. There the husband sent his wife away. But, what evidence is there here to shew that the husband deserted his wife?]

What occurred in June, 1873, shews that he intended to desert her.

[FIELD, J. How is "desertion" to be defined?]

A wilful absenting himself from the society of his wife, coupled with an intention on the part of the husband to continue to live apart, in spite of her wish, and without any intention to return to cohabitation: *Thompson* v. *Thompson* (1); *Yeatman* v. *Yeatman*. (2)

McConnell, contrà, was not called upon.

FIELD, J. In this case I have come to the conclusion that we must answer the question which has been put to us,—that is to say, that part which asks us "whether or not in point of law it was competent for the court of quarter sessions, upon and drawing the proper inferences from the evidence adduced, to find that Sarah Cook was within the meaning of the statutes and for poor-law purposes a deserted wife, and had acquired a settlement in the appellants' union,"—in the negative.

I quite agree with Mr. Lancaster that it is not for us to draw the inferences of fact which the sessions ought to have drawn, and that, if there is evidence on both sides, and the sessions have found in accordance with their view of the weight of the evidence, it is not for us to reverse their finding or to interfere in any way with it. If there was any reasonable evidence here that the husband had within the meaning of the Act deserted his wife, we should be bound to affirm their decision. But I am of opinion that there was no reasonable evidence that he did so desert her. The object of the Act is this, that, where a husband has by his desertion of her reduced the wife to the condition of a feme sole, she shall not be deprived of the advantage of gaining a settlement as a feme sole, or be liable to be removed to the place of settlement of a husband who has treated her in that way. That being the

(1) 27 L. J. (P. & M.) 65. (2) Law Rep. 1 P. & D. 489.

1882

THE QUEEN v. COOKHAM UNION.

Field, J.

evident policy of the Act, let us see what language the legislature has used to carry out that object. The words of the section are, "where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would if she were a widow render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her." The word "desertion" is to be found in Acts of Parliament wholly unconnected with the poor-law; for instance, in the Divorce Act, 20 & 21 Vict. c. 85, s. 16; and there it has received a judicial interpretation, as in *Thompson* v. *Thompson* (1),—"If the husband wilfully absents himself from the society of his wife in spite of her wish." With that definition as applied to the subject there under discussion I cordially agree; but I by no means say that it can be applied in its entirety to this Act; for I agree with Mr. Lancaster that desertion in an Act of Parliament relating to separation and divorce is not necessarily applicable to desertion in an Act relating to the management of the poor. The language of every statute must be read according to its subject-matter. Nevertheless, I feel some difficulty in giving the word desertion here a better interpretation than that given to it by the Judge Ordinary in *Thompson* v. *Thompson*. (1) I asked the learned counsel in the course of his argument if he could furnish me with one which would be more satisfactory. The answer he gave me was this,—"Living separate and apart, coupled with an intention on the part of the husband to continue separate, whatever might be the wish of the wife." I must confess I was not satisfied with that definition. I agree again with Mr. Lancaster that you may infer desertion from certain acts in one case which in another would not justify the same inference. Now, what are the acts and circumstances from which it is sought to infer desertion here. The parties, it seems, were living a life of discomfort, with constant bickerings: and there seems to have been immoral conduct on both sides. One night, in June, 1873, the wife, who had been drinking at a public-house with another man, with whom her husband reasonably suspected her of too much intimacy, came home the worse for drink, and found the

(1) 27 L. J. (P. & M.) 65.

door locked. She forced her way in; and, in the morning, after some words, her husband threatened to lock her in. He then went out to his work, and when he came back he found his wife absent, and that part of his furniture and clothes had been carried away. The wife took a room elsewhere, and then went away with her paramour, Wyatt, with whom she lived in adultery until his death in 1879. After Wyatt's death, the wife wrote to her husband asking him to receive her back; and he took no notice of her letter. Under these circumstances, what is the evidence of desertion by the husband? It is true, he said, on his cross-examination, that he never would have taken her back. But this is not a question of intention: the question is what act of the husband amounted in law to a desertion of his wife. What is "desertion?" It must be a leaving of somebody or something. A sailor deserts his ship; a soldier deserts his regiment. But, suppose a sailor goes on shore and gets drunk, and his ship sails without him; or, suppose a soldier outstays his leave for the same cause, and does not appear at roll-call, and in the meantime his regiment is ordered off in the middle of the night, and embarks for foreign service next day before he can rejoin it,—in either of these cases, could it be said that the sailor deserts his ship or the soldier his regiment? Does, then, a husband desert his wife, because, after she has gone off with another man and continued to cohabit with him for six years, he declines to receive her back? I must confess I see no reasonable ground for inferring a desertion of the wife by the husband here, and therefore I think the appeal must be allowed.

CAVE, J. I am of the same opinion. The question for the sessions was whether the pauper had been "deserted" by her husband. They found that she had. The question for us is whether there was any reasonable evidence to warrant that finding. Ordinarily speaking, a husband may be said to desert his wife when he absents himself from the conjugal home, and abandons his wife without any intention of returning to cohabitation. In *Reg.* v. *Maidstone Union* (1), the husband did not absent himself from the conjugal home, but turned his wife out because

(1) 5 Q. B. D. 31.

1882

THE QUEEN v. COOKHAM UNION.

Cave, J.

she had committed adultery, and refused to receive her back: and the Court held that there had been such a desertion of her by him as to bring the case within 24 & 25 Vict. c. 55, s. 3. Here, we are asked to go further and to say that, where the wife departs from the conjugal home of her own free will, and remains absent for six years, living a life of profligacy in the meantime, the husband is guilty of deserting his wife. There was abundant evidence that the wife deserted her husband: but I am of opinion that there was no evidence at all that the husband deserted her.

Appeal allowed.

Solicitor for appellants: *A. Scott Lawson, for R. A. Ward, Maidenhead.*

Solicitors for respondents: *Field, Roscoe, & Co., for Bellringer & Cunliffe, Liverpool.*

J. S.

July 7.

[IN THE COURT OF APPEAL.]

MASPONS Y HERMANO *v.* MILDRED, GOYENECHE & CO.

Principal and Agent—Undisclosed Principal—Foreign Consignor—Commission Agent—Marine Insurance—Right to Policy-money—Set-off—Privity of Contract—Right to sue—Conflict of Laws.

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The defendants, an English firm, traded with D., a Spanish shipping agent at Havannah. The plaintiffs, who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party who was alluded to as the "interesado," but the name of the plaintiffs was not disclosed.

The defendants effected an insurance in London on the ship in the name of themselves and for the benefit of all parties interested.

The ship having been lost, the policy-money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole of the money after deducting the premiums and expenses. The defendants claimed a lien for the balance of their general account due from D.:—

Held, first, that the questions must be determined according to English law, and not according to the law of Spain, the law of Spain being material only with regard to the nature and extent of the authority given by the plaintiffs to D.

Secondly, that the insurance was for the benefit of the plaintiffs, subject to the lien of the defendants and D. in respect of the cargo consigned to the defendants.

Thirdly, that there was privity of contract between the plaintiffs and defend-

ants, and that the plaintiffs had a right of action against the defendants for the balance of the policy-moneys.

Fourthly, that the defendants had no lien on the money, or right of set-off, for the balance of their general account due from D.

The unsigned underwriters' slips constitute only a provisional insurance, not binding in law on the underwriters; and the rights of the parties must be determined by the policies when executed.

Affirmed by H. of L. 8 App. Cas. 874

APPEAL from a judgment of Manisty, J. The facts were as follows:—

The plaintiffs, Messrs. Maspons y Hermano, were merchants carrying on business in Havannah, and the defendants, Messrs. Mildred, Goyeneche & Co., were merchants in London. Messrs. Demestre & Co. carried on business in Havannah as shipping agents, bankers, and importers, and were employed by the plaintiffs to ship goods for them to the defendants, for sale on the plaintiffs' account. The defendants knew Demestre & Co., and corresponded with them and had extensive dealings with them, but, although the plaintiffs knew who the defendants were, and wished Demestre & Co. to employ them, the defendants knew nothing of the plaintiffs, and when the plaintiffs sent goods through Demestre & Co. to the defendants for sale, the goods were sent in Demestre & Co.'s name, and the defendants accounted to Demestre & Co. for them, and Demestre & Co. accounted to the plaintiffs. On the other hand, the defendants acted as bankers and factors for Demestre & Co., and made them advances, upon the understanding and agreement that Demestre & Co. should remit to the defendants cash, bills, or goods, to cover such advances. The defendants kept only one account with Demestre & Co., although they sometimes made advances on specific consignments.

In July, 1880, the plaintiffs made arrangements with Demestre & Co. to forward to the defendants for sale a cargo of tobacco, some samples of which had been sent previously. Demestre & Co. accordingly chartered the ship *Bachi* in their own names, the tobacco was put on board, the bills of lading for it were made out in Demestre & Co.'s name. The vessel was chartered to go to Gibraltar and Marseilles. The defendants were to sell the cargo there, or, if desirable, elsewhere, and the defendants were to insure

1882

MASPONS Y HERMANO v. MILDRED.

the cargo in London. The correspondence relating to this transaction was contained in the following letters and telegrams.

On the 19th of July, 1880, the plaintiffs wrote to Demestre & Co. approving of their having signed the charterparty of the *Bachi* for Gibraltar and Marseilles and adding "In this vessel we will ship, as already informed you, about 1500 bales of tobacco, and about 550 quintal cwt. of pica dura for both ports, which shipment you will send to the order of Messrs. Mildred, Goyeneche & Co., of London, as usual on the basis already stipulated. In the meantime you can telegraph your friends in London to open provisional policies of insurance."

On the 24th of July, Demestre & Co. wrote to the defendants, and after referring to some bales of tobacco which they had already shipped to them, by way of trial, they added, "The interesado has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig *Bachi* for Gibraltar and Marseilles." After stating the amount of the cargo, they added, "which we are going to ship to your consignment, with bill of lading to order, that you may order the reshipment to Gibraltar of the whole or a part, to whatever destination you may judge most convenient."

Before this letter was received, namely, on the 28th of July, the defendants received a telegram from Demestre & Co.—"Insure all risks, 8000*l.* cargo, tobacco, Spanish schooner *Bachi*, consigned to you." On the 29th of July the defendants wrote to Demestre & Co. acknowledging the receipt of this telegram, and saying that they had opened a provisional policy for the amount mentioned, "sailing on the 1st of August."

On the 31st of July, Demestre & Co. wrote to the defendants that they were "despatching the *Bachi*, which sails for its destination to-morrow," and added that they were going to telegraph to the defendants to insure the cargo for 3000*l.* more. A telegram to that effect was received by the defendants on the 3rd of August. On the 3rd of August Demestre & Co. wrote to the plaintiffs informing them of what they had done. On the 5th of August, the defendants wrote to Demestre & Co. telling them that they had increased the insurance to 11,000*l.*

The underwriters' slips for these two policies were produced at

the hearing of the appeal. They were unsigned and unstamped, and dated the 28th of July, and the 3rd of August.

The policies were not executed till the 18th of September. They were made out in the name of the defendants for the benefit of all persons whom it might concern.

On the 7th of August Demestre & Co. wrote to the defendants informing them that the *Bachi* did not sail till the 4th of August, and in this letter they again referred to the "interesado."

The letter of Demestre & Co. to the defendants of the 24th of July was received by them on the 9th of August, and was answered by them on the 10th, and Demestre & Co.'s letter of the 31st of July was received by the defendants on the 16th of August, and was answered by them on the 17th.

The ship sailed on the 4th of August, and was lost on the 13th of the same month, but her loss was not known to the defendants until five or six days afterwards, and was not known to Demestre & Co., or to the plaintiffs, until a day or two later.

A few days before the policy was obtained Demestre & Co. failed, and before the underwriters had paid to the defendants the amounts insured by the policies the plaintiffs claimed to be entitled to the proceeds of the policies, and the defendants knew of this claim. The defendants received from the underwriters 11,000*l.* in respect of the policies.

The present action was brought by the plaintiffs to recover the 11,000*l.* from the defendants after deducting the premiums paid by them on the policies and what, if anything, Demestre & Co. might have been entitled to deduct or set-off as against the plaintiffs, if Demestre & Co. had received the policy moneys and remitted them to the plaintiffs themselves.

On the other hand the defendants claimed to retain the whole of the policy moneys upon the ground that Demestre & Co. were indebted to them in a larger amount upon the general balance of accounts between them.

The action was tried before Manisty, J., and a special jury in London, and the following are the questions which the judge left to the jury and the answers which they made to them:—

"Were the goods which constituted the cargo in question the property of the plaintiffs?" Answer.—"Yes."

1882

MASPONS Y HERMANO v. MILDRED.

"Were the defendants employed by the plaintiffs to sell the goods in question for them, and to account to them for the proceeds, and did the defendants accept that employment?" Answer. —"Not employed directly by the plaintiffs, and defendants did not accept such employment."

"Or were the defendants employed by Demestre & Co. to sell the goods and account to them for the proceeds, and did they accept that employment?" Answer.—"Yes."

"Did the defendants know, or have reason to believe, that Demestre & Co. were acting as agents for some other person or persons not named?" Answer.—"Yes; they knew or had reason to believe it."

"Were the defendants employed by the plaintiffs to receive the amount of the insurance for them and to account to them for the same, and did they accept that employment?" Answer.— "No."

"Did the defendants receive the amount of the insurance as agents for and on account of the plaintiffs, or as agents for and on account of Demestre & Co.?" Answer.—"They received it for and on account of Demestre & Co., and the individual interested."

"Did the plaintiffs authorize Demestre & Co. to ship and consign the goods to the defendants in their own names, and were they so shipped and consigned?" Answer.—"Yes."

"On whose behalf and for whose benefit were the insurances effected?" Answer.—"For all parties whom it might concern."

"Is there a usual, ordinary, and well-known course of business between foreign consignors and merchants in London for the latter to make advances to the former against goods and usual shipping documents, on the terms that the London merchants are to be entitled to hold the proceeds of all the goods so consigned, or, if they are lost by the perils of the sea, the insurance money, against any balance that may be due to them on their general account current with the consignors?" Answer.—"There is not sufficient evidence to enable the jury to decide."

Upon these findings the judge entered a verdict and judgment for the defendants.

The plaintiffs appealed from this judgment, and also applied to

the Divisional Court for an extension of time to move for a new trial. Upon the appeal being opened it was arranged that the whole case should be argued and determined upon the judge's notes of the evidence, the correspondence and other documents used at the trial, and the findings of the jury, the Court being at liberty to draw inferences of fact from the materials thus placed before it, and to give such judgment as the Court might think right.

The following articles of the Commercial Law of Spain were relied on by the defendants as shewing the rights of persons dealing with agents, when the principal is undisclosed:—

"Agents." Sect. II. Art. 118. The agent, although he may deal on account of another, can act in his own name. Consequently he is under no obligation to state who is the person on whose account he contracts, but he is bound directly towards the persons with whom he contracts, as if the business were his own.

Art. 119. When the agent acts in his own name the principal has no right of action against the persons with whom the former has contracted in the business which he (the principal) entrusted him with, unless there be first a transfer made in his favour by the said agent. Neither is any right of action acquired against the principal by those dealing with his agent for obligations which the latter has contracted.

An affidavit of a Spanish advocate was also produced explaining these articles.

Butt, Q.C., and *Barnes*, for the plaintiffs. On the findings of the jury the judgment ought to have been entered for the plaintiffs. The rights of the parties are to be governed by English law, and there is no such custom or course of business as that suggested in the last question submitted to the jury, by which English merchants dealing with foreign consignors are entitled to retain the proceeds of goods or the insurance moneys to defray their own private debts from the consignors. The defendants in the present case had notice that Demestre & Co. were acting for third parties, although they did not know their names, and they have no right to deduct their private debt from the policy moneys

1882

MASFONS Y HERMANO v. MILDRED.

which represent the value of the goods: *New Zealand Land Co.* v. *Watson.* (1)

[They were stopped by the Court.]

Benjamin, Q.C., and *Cohen, Q.C.* (*Arbuthnot*, with them), for the defendants. The Spanish law, which is the law of Havannah, governs the contract in this case. There was no English contract between the plaintiffs and the defendants. The defendants had never heard of the plaintiffs. The only contracts were between the defendants and Demestre and between Demestre and the plaintiffs, and both of those must be governed by Spanish law. It is clear from the 118th and 119th articles of the Commercial Code that in such a case as this the agent must be treated in all respects as a principal, and the undisclosed principal has no right of action against the defendants.

But if the rights of the parties are governed by English law the result is the same. It was the intention of all parties that Demestre & Co. should be considered as the real principals. All the circumstances confirm this. The defendants had never had any dealings with the plaintiffs, and did not wish to have any, and therefore the plaintiffs dealt with them through Demestre & Co., who were known to the defendants, and from whom they had consented to receive consignments. How can the defendants be forced to deal with the plaintiffs against their will? All the shipping documents were made out in the name of Demestre & Co., and they had authority to deal with them as their own. By the law of most civilised nations with respect to commission agents an undisclosed principal is no principal at all: Commercial Code of France (book 1, title 6, "Commissionaires"); Troplong's Droit Civil ("Mandat," 525, 530.) By the English law factors are forbidden by statute to pledge the goods in their hands; but it is otherwise in other countries. No doubt in England there are decisions which shew that an undisclosed principal may intervene and bring an action, but the more modern cases have a contrary tendency where the dealing is with a foreign merchant: *Armstrong* v. *Stokes* (2); *Elbinger Actien Gessellschaft* v. *Claye* (3); *New Zealand Land Co.* v. *Watson.* (1) It would be impossible to

(1) 7 Q. B. D. 374. (2) Law Rep. 7 Q. B. 598, at p. 603.
(3) Law Rep. 8 Q. B. 313.

carry on business in England satisfactorily if English merchants were always obliged to inquire to whom the goods consigned by foreign commission agents really belonged. The position of a broker is different; every one knows that there is a principal behind. But in the case of a commission agent it is uncertain whether the goods belong to him or not.

In the second place, the defendants at the time they insured the cargo had no notice that Demestre & Co. were acting as agents for any one. The first telegram was received on the 28th of July, 1880, and it contained no allusion to any other person being interested except Demestre & Co. The defendants at once effected a provisional insurance, and their rights must be determined with reference to that date. They therefore have the same right of lien and set-off for the general balance owed them by Demestre & Co. as if there had been no undisclosed principal. The underwriters' slip is not a mere honourable engagement of the underwriters, but it can be stamped and produced in evidence as a contract. But if the completed policies are alone considered the result is the same. At the date of their creation the defendants had no notice that the cargo belonged to the plaintiffs, but only that there was some person interested, who was called the interesado; but they did not know what the nature of his interest was. It is true that the policies were effected on behalf of all parties concerned: for that is the usual form of all policies, in order to prevent the money being paid twice over. But the defendants insured for their own benefit and that of the consignors, not for that of the plaintiffs, of whom they knew nothing. This is not a question of property in the goods, but of contract. The cargo is lost, and whether the plaintiffs might have had a right to follow the goods or not, they cannot seize the insurance money, the right to which rests upon the contract between the consignors and the defendants, to which the plaintiffs were not parties: *Westwood* v. *Bell* (1); *Godin* v. *London Assurance Co.* (2); *Cahill* v. *Dawson* (3); *Armstrong* v. *Stokes* (4); *Irvine* v. *Watson* (5); *Barnett* v. *Brandao* (6); Arnould on Marine

(1) 4 Camp. 349.
(2) 1 Burr. 489.
(3) 3 C. B. (N.S.) 106.
(4) Law Rep. 7 Q. B. 598.
(5) 5 Q. B. D. 414.
(6) 6 M. & Gr. 630.

1882

MASPONS Y HERMANO v. MILDRED

Insurance, 5th ed. p. 212; Duer on Marine Insurance, vol. 2, p. 285.

Barnes, in reply. The underwriters' slips did not constitute a contract. They are not signed, and were merely intended as a provisional insurance to be subsequently completed. The only contract was in the executed policies, and at that time the defendants knew that Demestre & Co. were only agents, and that there was a principal behind. The policies are effected for the benefit of all persons interested whoever they might be. There is no difference between the rights of the plaintiffs in the goods and in the insurance money, the one represents the other. With respect to the contention of the defendants that in transactions between an English merchant and a foreign commission agent, the commission agent is treated as a principal, in the cases relied on the foreign commission agent has been the buyer; there are no cases in which a commission agent consigning goods to England has been held to be in that position. The defendants say that there were two contracts, one between Demestre & Co. and the defendants, and one between Demestre & Co. and the plaintiffs. That was not so; there was one contract, namely, between the plaintiffs and the defendants, which must be construed according to English law. Demestre & Co. were not employed to sell the plaintiffs' goods, but to forward them to the defendants for sale by them. There was therefore privity between the plaintiffs and the defendants: *De Bussche* v. *Alt* (1); *Mann* v. *Forrester* (2); *Bodenham* v. *Hoskins* (3); *Pannell* v. *Hurley* (4); *Ex parte Kingston* (5); Story on Agency, 201, 217 (a).

Cur. adv. vult.

1882. July 7. The judgment of the Court (Jessel, M.R., Lindley and Bowen, L.JJ.) was delivered by

LINDLEY, L.J. After stating the facts as set forth above, his Lordship proceeded as follows: The questions at issue between the parties reduce themselves to two, viz., first, Can the plaintiffs sue the defendants at all? Secondly, If they can, are the defend-

(1) 8 Ch. D. 286.
(2) 4 Camp. 60.
(3) 21 L. J. (N.S.) (Ch.) 864.
(4) 2 Coll. 241.
(5) Law Rep. 6 Ch. 632.

ants entitled to the set-off they rely on? With respect to the first question the defendants contend that they are accountable to Demestre & Co. alone; that there is no privity of contract between the plaintiffs and the defendants, and that the plaintiffs have no right to sue, unless it be in the name of Demestre & Co. In support of this contention reliance was placed on the Spanish law prevailing at Havannah, on the judgment of Lord Blackburn in *Armstrong* v. *Stokes* (1), and on the decisions in *Elbinger Actien Gesellschaft* v. *Claye* (2), and in *New Zealand Land Co.* v. *Watson.* (3) The Spanish Code, by ss. 118 and 119, as explained by the witness Girado, of the Spanish Bar, authorizes an agent to act in his own name, relieves him from all obligation to disclose his principal, binds him as if he were the principal, and precludes the principal from enforcing the contract made by the agent, unless the agent has first transferred his right of action to his principal. These rules, moreover, apply to cases in which the agent is known by the person dealing with him to have a principal, if the name of that principal is not disclosed. The defendants were aware of the Spanish law on this subject, and contend that they were entitled to treat Demestre & Co. as principals and owners of the cargo, and to ignore the plaintiffs altogether. The Spanish law appears to us to be a circumstance to be taken into account in considering the nature and extent of the authority given by the plaintiffs to Demestre & Co.; but the Spanish law is not, in our opinion, material for any other purpose. The contract between Demestre & Co. and the defendants is governed by English law, not Spanish, and the persons who can sue and be sued on that contract in England must also be determined by our law, and not by the law of Spain.

We proceed, therefore, to consider the nature and extent of Demestre & Co.'s authority, and the knowledge which the defendants had on that subject. The plaintiffs certainly authorized Demestre & Co. to ship the tobacco in question in their own names, and to consign it to the defendants for sale. The tobacco was unquestionably the plaintiffs' property, and was to be sold on their account, and was to be insured for them as owners.

(1) Law Rep. 7 Q. B. 598. (2) Law Rep. 8 Q. B. 313.
(3) 7 Q. B. D. 374.

1882

MASPONS Y HERMANO v. MILDRED.

Demestre & Co. were, in our opinion, authorized to receive the proceeds of the sale of the goods from the defendants in the event of a sale; but we are unable to adopt the defendants' contention that Demestre & Co. had authority to deal with the goods as their own, nor did they in fact so deal with them. When the defendants received the telegrams of the 28th of July and the 3rd of August, and effected a provisional insurance, they did not know to whom the cargo belonged, nor for whom it was to be insured. But, before the 18th of September, when the policy was really effected, the defendants had received the two letters of the 24th and 31st of July, and knew that Demestre & Co. were acting for some third person, alluded to as the "interesado," both in shipping the goods and in ordering the insurance; and, with this knowledge the defendants effected the insurance in their own names, for the benefit of all persons interested. By their letters of the 10th and 17th of August the defendants in effect inform Demestre & Co. that the provisional insurances, effected before their letters had arrived, were such as they were directed to effect by those letters. In other words, the defendants drew no distinction between the provisional insurances and the real policies. They treated the former as merely preliminary to the latter, and this, we have no doubt, was the real fact. The provisional insurances were effected by unsigned slips in the usual way; they were in law not binding on the underwriters, and it is impossible, in our opinion, to treat the defendants as having effected the policies for their own benefit, or for the benefit of themselves and Demestre & Co., to the exclusion of the "interesado." The jury were, in our opinion, quite right in finding that the defendants effected the insurances for the benefit of all concerned—i.e., as it turns out, for the benefit of the plaintiffs and of Demestre & Co. and of the defendants, according to their respective interests in the cargo. The plaintiffs being the owners of the cargo, the insurance was, consequently, for the benefit, subject to the liens, if any, of Demestre & Co. and of the defendants respectively. The question now arises, whether by English law the plaintiffs are entitled, as undisclosed principals, to sue the defendants for the moneys they have received in respect of the insurance thus effected? The English law respecting undisclosed principals is well-known to

differ from the law of many other, if not most other, countries. Their law is similar to the law of Spain, which has already been alluded to. But that by our law the plaintiffs are entitled to sue the defendants under the circumstances above set forth has been long settled. That the plaintiffs could sue, if they were not foreigners carrying on business abroad, is plain from the cases collected in the notes to *Thompson* v. *Davenport* (1), and from *Irvine* v. *Watson* (2), one of the most recent authorities on the subject. But it was contended that, inasmuch as the plaintiffs were foreigners carrying on business abroad, the case was different. We are, however, unable to come to this conclusion. In the first place, *Lanyon* v. *Blanchard* (3), *Mann* v. *Forrester* (4), and *Maanss* v. *Henderson* (5), are direct authorities in support of such an action as this. In the second place, it is to be observed that this is not a case in which the defendants dealt with an English house acting for a foreign principal. Demestre & Co. were themselves a foreign house, and, although the defendants relied upon a custom or usage of trade which, if proved, would have shewn that there was no contract between the plaintiffs and the defendants, the alleged custom or usage was not proved. Thirdly, the defendants in this case were neither buying from nor selling to Demestre & Co.; the defendants were simply consignees for sale, acting for Demestre & Co., who, as the defendants knew, were themselves acting for some third person. In these respects the case differs from such cases as *Elbinger Actien Gesellschaft* v. *Claye* (6) and *Hutton* v. *Bullock*. (7) As regards foreigners who buy or sell goods through English commission merchants, we take the law to be as stated by Lord Blackburn in *Armstrong* v. *Stokes* (8) :—

"The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from

(1) 2 Sm. L. C. 390, 8th ed.
(2) 5 Q. B. D. 102 and 414.
(3) 2 Camp. 596.
(4) 4 Camp. 60.
(5) 1 East, 335.
(6) Law Rep. 8 Q. B. 313.
(7) Law Rep. 8 Q. B. 331.
(8) Law Rep. 7 Q. B. 605.

1882

MASPONS Y HERMANO v. MILDRED.

whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well-known that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit."

This view of the law was acted upon in the two cases in Law Rep. 8 Q. B., referred to above. But we are not aware of any authority extending this exception to the general rule to such a case as this. *New Zealand Land Co.* v. *Watson* (1) was strongly relied upon by the defendants as an authority against the plaintiffs' right to maintain this action. That case seems at first sight very like the present in many respects. But the differences are as important as the resemblances. The authority and course of dealing in that case were different from those we have now to consider. In *New Zealand Land Co.* v. *Watson* (1) the plaintiffs had consigned their goods to an English house by whom the defendants were employed, and the English house were the plaintiffs' del credere agents. Both these circumstances are wanting in the present case. If the plaintiffs here were suing persons employed by the defendants, the decision in question would more closely resemble this than it does. The truth seems to be that in *New Zealand Land Co.* v. *Watson* (1) the doctrine laid down in *Armstrong* v. *Stokes* (2) was carried one step further than it had been before, and the defendants contend that it ought to be carried a step further still, and to be extended to cases in which an English house is employed by a foreign agent for a foreign principal, who afterwards sues the English house. Where an English merchant acts as a middle-man for a foreign undisclosed principal, buying or selling through him, the person dealing with

(1) 7 Q. B. D. 374. (2) Law Rep. 7 Q. B. 598.

the English merchant does not, primâ facie, contract with the undisclosed principal; and to this extent the ordinary English doctrines relating to undisclosed principals have been gradually modified with reference to mercantile usage and convenience. But we are not aware that any decision goes further than these, and we do not feel warranted in further encroaching on those doctrines. We adopt the view of Lord Blackburn in Law Rep. 7 Q. B. 704, that it is too late now to question the propriety of the English law on this subject. If the English law is to be made to conform with foreign law in this respect, it must be by legislative enactment rather than by judicial decision.

We pass now to the second contention of the defendants—viz., that, even if the plaintiffs are entitled to sue the defendants, the defendants are entitled to a lien or right of set-off against the plaintiffs in respect of the amount due to the defendants from Demestre & Co. on the general balance of their accounts. This question, whether regarded as a question of lien or as a question of set-off, must again be determined by English law. On this subject we may refer to *McFarlane* v. *Norris* (1) and *Meyer* v. *Dresser*. (2) According to our law, the right of the defendants to a lien or set-off depends on a question of fact—viz., whether the defendants did or did not know that Demestre & Co. were acting for an undisclosed principal before the defendants' alleged lien or right of set-off accrued? It is admitted that the defendants knew the plaintiffs' real position before the defendants received the proceeds of the policies, but it was contended that they had no notice of any agency when they effected the insurance, and that, consequently, they acquired a lien on the policies for the balance due to them by Demestre & Co., and that this lien entitled the defendants to retain the proceeds of the policies. It has, however, already been shewn that when the defendants obtained the policies on the 18th of September, they knew of the interesado, and that the insurance was for his benefit. It has also been shewn that the provisional insurance made by the defendants before they had this notice cannot avail them so as to put them in a better position than the policies themselves. It follows, therefore, that the lien or set-off contended for cannot be maintained.

(1) 2 B. & S. 783. (2) 16 C. B. (N.S.) 646, at p. 665.

1882

MASPONS Y HERMANO v. MILDRED

The rule which allows a person who deals with an agent not known to be such to set off against his principal any debt due from the agent to the person so dealing with him, is well settled: *George* v. *Clagett* (1); but it is equally well settled that this rule does not apply where the person dealing with the agent knows him to have a principal, although the name of the principal may not be disclosed. Whether the undisclosed principal carries on business in this country, as in *Fish* v. *Kempton* (2), *Semenza* v. *Brinsley* (3), *Ex parte Dixon* (4), and *Irvine* v. *Watson* (5), or abroad, as in *Lanyon* v. *Blanchard* (6) and *Maanss* v. *Henderson* (7), is immaterial. Upon this point, as well as the first, the defendants relied on *New Zealand Land Co.* v. *Watson* (8), but the main difference between that case and this has been already pointed out. As regards the money sought to be set off in that case, the set-off was made before the plaintiffs had made any claim against the defendants; while here the plaintiffs made their claim before the defendants received the proceeds of the policy. In *New Zealand Land Co.* v. *Watson* (8) the plaintiffs sought to follow their goods and the proceeds thereof into the hands of the defendants, and the Court appears to have thought that, although they might have followed the goods, they could not follow the proceeds after they had been sold. It is difficult to follow this reasoning. The observations of Lord Blackburn about following goods (9) ought to be constantly borne in mind in cases of this description. He said: "It is right, in order to avoid misapprehension, to say that the phrase, repeatedly used by the counsel for the plaintiff, that the vendor has a right to follow the goods, is, in our opinion, calculated to mislead. There are cases, such as that of *Wilson* v. *Hart* (10), to which such a phrase would be applicable; but those, as is pointed out in 2 Smith's Leading Cases, proceed on the ground of fraud. In the absence of fraud, unless the person receiving the goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the

(1) 2 Sm. L. C. 118.
(2) 7 C. B. 687.
(3) 18 C. B. (N.S.) 467.
(4) 4 Ch. D. 133.
(5) 5 Q. B. D. 102 and 414.
(6) 2 Cap. 596.
(7) 1 East, 335.
(8) 7 Q. B. D. 374.
(9) Law Rep. 7 Q. B. 606.
(10) 7 Taunt. 295.

goods were bricks sold to a contractor he could not charge the owner of the house into which they were built, though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house; and the principle is the same in such a case as the present." Applying these observations to the New Zealand Land Company's case, the inability of the plaintiffs to follow their goods into the hands of the defendants and to recover them, without satisfying the defendants' lien, would seem to have followed as soon as it was decided that there was no contract on which the plaintiffs could sue the defendants. In this case there is such a contract, and, having regard to it and to the knowledge the defendants had when they effected the insurance, the New Zealand Land Company's case cannot be regarded as an authority in their favour. If in this case the goods had not been lost, but had been sold by the defendants, and they had paid Demestre & Co. before the plaintiffs revoked their authority to receive payment, such payment would have discharged the defendants, for the plaintiffs clearly authorized Demestre & Co. to receive payment. But it is equally clear that the plaintiffs did not authorize Demestre & Co. to apply the proceeds of the plaintiffs' goods in paying a debt of their own. Having regard to the authority conferred on Demestre & Co., the defendants could not have asserted, as against the plaintiffs, a lien on the goods or their proceeds for the general balance due from Demestre & Co.

Nor, under the circumstances of this case, can the defendants establish a better title to the policy or its proceeds than they would have had to the goods if they had arrived. If, when the defendants effected the insurance, they had effected it for their own benefit, without notice that the goods were not Demestre & Co.'s, the defendants might have acquired a better title to the policy and its proceeds than they would have had to the goods; but, as matters stand, we are unable to see any distinction between the two. Looking at the case broadly, there is some inconvenience, not to say injustice, whichever way this case is decided. On the one hand, it is not right to pay one man's debts out of another man's money, which is what the defendants are seeking to do. On the other hand, it is not right to avail one's-self of another man's credit and connection, and not comply with the conditions on

1882

MASPONS Y HERMANO v. MILDRED.

which that credit and connection rest, and this is what the plaintiffs are seeking to do. The plaintiffs, however, never led the defendants to believe that the goods were Demestre & Co.'s, for, although the bills of lading were in their name, the letter which accompanied the bills of lading informed the defendants that the goods were not Demestre & Co.'s, and were to be insured for the interesado. For the reasons above given, the plaintiffs appear to us to be entitled to recover the 11,000*l.*, subject to the deductions which they themselves concede ought to be made. The amount of these must, if not agreed upon, be ascertained by inquiry; but the judgment entered for the defendants must be reversed, and judgment must be entered for the plaintiffs, with costs up to and including the appeal.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Freshfields & Williams.*

M. W.

May 4.

[IN THE COURT OF APPEAL.]

NEILSON *v.* JAMES.

*Negligence—Stockbroker—Sale of Joint Stock Bank Shares—Name of Shareholder—*30 *&* 31 *Vict. c.* 29, *s.* 1*—Custom of Stock Exchange.*

The defendant, a stockbroker, who had undertaken to sell shares of a joint stock bank for the plaintiff, a shareholder, sold them to a jobber on the Stock Exchange and sent an advice note of such sale to the plaintiff, but in accordance with the custom of the Stock Exchange, the bought and sold notes between the defendant and the jobber omitted to state the name of the registered proprietor of the shares as required by 30 & 31 Vict. c. 29, s. 1, by reason of which the contract for sale was void, and the bank having stopped, and an order for its winding-up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, and the plaintiff remained the holder of the shares:—

Held, that the defendant had committed a breach of duty in not making a valid contract for sale, notwithstanding the custom of the Stock Exchange to disregard the said statute, as such custom was both unreasonable and illegal, and that for such breach of duty the plaintiff was entitled to recover from the defendant by way of damages the price at which the shares had been sold.

ACTION for damages for breach of duty as a broker, which was tried before Stephen, J., without a jury at the Middlesex Michaelmas sittings of 1881.

The facts were as follows:—Towards the end of November, 1878, the plaintiff employed the defendant, a stockbroker and member of the Bristol Stock Exchange, to sell twelve shares in the West of England and South Wales District Banking Company, of which the plaintiff was then the registered owner, and on the 4th of December, 1878, the defendant sold on the Bristol Stock Exchange seven of the said shares to Messrs. Bryant, Perry & Lowe, stock jobbers and brokers of the Bristol Stock Exchange, and accordingly bought and sold notes passed between them. The following is a copy of the bought note:—

"Bristol, Decr. 4, 1878.

"Bought of Mr. Harry James seven shares in the West of England Bank, at 16*l.* 12*s.* 6*d.* per share.

"For the account. "Bryant, Perry & Lowe, Brokers."

The sold note, which was sent by the defendant to Messrs. Bryant, Perry & Lowe, was similar to the bought note, and did not contain the name of the plaintiff. On the same day the defendant sent an advice note to the plaintiff, of which the following is a copy:—

"Bristol, 4 Decr., 1878.

"Sold by order and for account of R. Neilson, Esq. (subject to the rules of the Stock Exchange) seven shares in the West of England Bank 15*l.* paid at 16*l.* 12*s.* 6*d.*

	£	*s.*	*d.*
	116	7	6
Brokerage		17	6
	£115	10	0

"For the account. "Harry James."

The account day was the 15th of December.

It is the practice of the Bristol Exchange to have a name day on which brokers who have purchased shares for undisclosed principals send to the vendors or their brokers the names and addresses of their principals to whom the shares are to be transferred. The 13th of December was the name day in respect of these seven shares, and on that day Messrs. Bryant, Perry & Lowe furnished the name and address of one John Blatchford Gould as the pur-

1882

NEILSON v. JAMES.

chaser of the said shares. But in the meantime, viz. on the 7th of December, the bank suspended payment, and an order was afterwards made for its winding-up, and in consequence thereof the said J. B. Gould repudiated the purchase, and would neither take nor pay for the shares, relying on the want of a binding contract pursuant to 30 & 31 Vict. c. 29, s. 1. (1)

The said bank was a joint stock banking company within the meaning of that enactment, and its shares were not distinguished by numbers, but were identified by the owner's name on the register.

In consequence of the said J. B. Gould not completing the purchase the plaintiff remained the registered owner of the said seven shares, and was obliged to pay calls which were afterwards made on these shares. (2)

The defendant, in his defence, relied on the custom on the

(1) By 30 & 31 Vict. c. 29, s. 1, "all contracts, agreements, and tokens of sale and purchase which shall from and after the 1st day of July, 1867, be made or entered into for the sale or transfer, or purporting to be for the sale or transfer of any share or shares, or of any stock or other interest in any joint stock banking company in the United Kingdom of Great Britain and Ireland constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent issuing shares or stock transferable by any deed or written instrument shall be null and void to all intents and purposes whatsoever, unless such contract, agreement, or other token shall set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid, or where there is no such register of shares or stock by distinguishing numbers, then unless such contract, agreement, or other token shall set forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company; and every person, whether principal, broker, or agent, who shall wilfully insert in any such contract, agreement, or other token, any false entry of such numbers, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as aforesaid shall be guilty of a misdemeanour and be punished accordingly, and if in Scotland, shall be guilty of an offence punishable by fine or imprisonment."

(2) The amount of such calls and the plaintiff's liability to pay further calls formed part of the damages which were claimed in this action, but as the plaintiff's counsel during the argument abandoned this and limited the claim to the price for which the shares were sold the facts and arguments respecting the right to recover such calls in this action are omitted.

1882.

NEILSON v. JAMES.

Bristol Stock Exchange of which he gave evidence, to give and take bought and sold notes of bank shares without such notes containing the name of the shareholder or other particulars required by 30 & 31 Vict. c. 29, s. 1, and that no such name or particulars are supplied until the name day. The learned judge was of opinion that the defendant had done all he had engaged to do for the plaintiff, and that he had only entered into an inchoate agreement for the sale of the shares which would become a binding contract on the 13th of December, when the name of the purchaser was to be given, and that as by reason of the failure of the bank before that day and the consequent inability to deliver the shares the contract fell through, the defendant was entitled to judgment; and he accordingly gave judgment for the defendant.

The plaintiff appealed.

Petheram, Q.C., and *Poole*, for the plaintiff. There was a complete contract for the sale of the seven shares on the 4th of December, 1878, when the defendant found a buyer of these shares, but because the defendant disregarded the 30 & 31 Vict. c. 29, and consequently made an invalid contract, it was never fulfilled and the plaintiff lost his purchase-money, and as he remained the owner of the shares he was obliged to pay further calls. There was therefore a breach of duty by the defendant for which he is liable, and in respect of which the plaintiff is entitled to recover substantial damages. He has lost the price for which the shares were sold, and to that extent he ought clearly to be indemnified, for there was no part of the contract which he had to perform which he could not have done. It was not for him to get the transfer registered. The inability to register the transfer in consequence of the failure of the bank would not affect his right to be paid the price of the shares: *Rudge* v. *Bowman* (1) and *Bowring* v. *Shepherd*. (2)

Charles, Q.C., and *H. T. Atkinson*, for the defendant. The duty which the defendant undertook to perform was to put these shares on the Bristol Stock Exchange with a view of obtaining a purchaser for them, and this duty he performed in accordance

(1) Law Rep. 3 Q. B. 689. (2) Law Rep. 6 Q. B. 309.

1882

NEILSON v. JAMES.

with the rules and custom of such stock exchange. On the 4th of December there was no contract, but only an agreement for one. There could be no contract until the name day according to the custom, and the Act 30 & 31 Vict. c. 29, prevented there being any such contract, for it makes void every agreement for the sale of bank shares which does not comply with the terms of that Act. The duty of the defendant was moreover to sell only for the account day, and before that day arrived the bank had stopped payment and was being wound up, and therefore no transfer of shares could be made without the order of the Court—25 & 26 Vict. c. 89, s. 153—and as the plaintiff consequently could not then make a transfer he is not entitled to recover the price at which the shares were sold, for the purchaser would not be bound to pay the price until he got a transfer, so that the damages can only be nominal.

Petheram, Q.C., replied.

LORD COLERIDGE, C.J. I am of opinion that on the first point which was made before us the judgment which has been given for the defendant cannot be supported, and that to the extent of 115*l.* 10*s.*, the amount for which the shares were sold, the plaintiff is entitled to recover. The action is brought against a broker for not fulfilling his contract with the plaintiff to get rid of certain shares. It is admitted that the defendant accepted an order which was given him to sell for the plaintiff certain shares in the West of England and South Wales District Banking Company, and that he purported to sell such shares by a sold note signed by him and which he sent to the plaintiff on the 4th of December, 1878. The note which he so sent was in these terms [His Lordship here read the advice note]. It appears that the name day was the 13th of December, and the account day the 15th of December. Now the defendant in making the contract for the sale of these shares did not comply with the Act of Parliament (30 & 31 Vict. c. 29, s. 1) by giving either the numbers of the shares or the name of their registered holder at the time he entered into the said contract, and therefore as far as concerned the making of a valid contract he entered into no contract at all. The paper which represented the bought note, so far from being a

binding contract for getting rid of these shares was wholly inoperative, and it did not relieve the plaintiff of any liability in respect of these shares. Now between the 4th of December and the name day the bank failed, and the plaintiff found that he was still the possessor of these seven shares, and was saddled with all the liability attaching to his being such possessor, and from which he would have been relieved if the defendant had performed his duty. Under these circumstances he brought this action.

The defence which the defendant has made is this, that he dealt according to the rules of the Bristol Stock Exchange, that the plaintiff knew this, and that on that Stock Exchange there is a custom to disregard the Act of Parliament, and on the sale of bank shares not to give the numbers or the names of the registered proprietor, but to sell them by a form such as was used in the present case, which if it be regarded as a contract is wholly inoperative by reason of the Act of Parliament, but which by the custom is to be treated as a mere agreement for a contract. The answer to this is that the custom to be good must be such as is lawful, and that the defendant cannot by disregarding the provisions of the Act of Parliament profess to make a contract, and yet at the same time say that it is not really a contract, because it is not a valid contract by reason of the statute. If that be so, then there was here a contract which purported to be such as the defendant had undertaken to make in discharge of his duty, but which was not in fact a discharge of such duty, because it was not a valid one according to the Act of Parliament. The result is that the plaintiff is still the holder of these seven shares, and has lost the benefit of their sale. The damage he has sustained is, first, the price of the article he directed the defendant to sell, and which if it had been properly sold he would have received, namely, the sum of 115*l.* 10*s.*, and to that extent, at least, he is entitled to recover. Besides that it was said that by the defendant's negligence the plaintiff was made liable for the consequences of his remaining the holder of these shares, and that he had a right to recover damages of the defendant on that account. It is not necessary, however, to give any opinion on this point since the plaintiff has wisely given up his right to such damages, and has limited his claim to the 115*l.* 10*s.*, and to that

1882

NEILSON v. JAMES.

Lord Coleridge, C.J.

extent he is certainly entitled to succeed, because all that the seller has to do is to deliver the shares to the purchaser at the time contracted for, and what remained to be done with them afterwards lay on the purchaser, so that it cannot be said that the damages ought to be merely nominal. The judgment must therefore be reversed.

BRETT, L.J. The defendant carries on a business well known to the law, namely, that of a stockbroker on the Stock Exchange. The plaintiff gave him an order to sell certain bank shares on the Stock Exchange, and the defendant accepted such order. Therefore there was a well-known duty which the defendant undertook to perform, namely, that he would use reasonable efforts to find a purchaser of such shares on the Stock Exchange, and that he would make a contract with him in such a form as would bind the purchaser to take the shares. The defendant accordingly did find a purchaser, namely, on the 4th of December, he found certain jobbers who undertook to take the shares, and as it seems to me, he undertook on that day to make a contract in a form which should bind such jobbers to take the shares of his employer. The defendant, however, says that although primâ facie it was his duty in the performance of his business to do so, yet he did not as a broker on the Bristol Stock Exchange undertake to do so, because of the custom of the Bristol Stock Exchange, and that he acted according to that custom, which custom binds the plaintiff. He does not say that the plaintiff knew of the custom, but he says that because the plaintiff employed him to sell the shares on that stock exchange, and according to its rules he is bound by its custom. I think, however, that the plaintiff is only bound by such a custom as is both reasonable and legal, for to that extent only can a person who is ignorant of a custom be assumed to acquiesce in and be bound by it. Now the contract for sale which the defendant made, did not comply with the terms of the Act 30 & 31 Vict. c. 29, and was, therefore, illegal and void, but it is alleged that by the custom of the Bristol Stock Exchange, although the defendant undertook to make a contract for sale, yet he did not undertake to make a contract which should bind the purchaser. Such a custom I think is both unreasonable and

illegal. It is further said on behalf of the defendant that he used all reasonable means to find a purchaser of the shares, but that he did not succeed in finding one, and it is endeavoured to support this by contending that what took place on the 4th of December did not amount to a contract, but only to an arrangement that on the 13th of December the jobbers would make a contract if they pleased, but that they were not then bound to make any contract at all. What, however, took place was this, on the 4th of December, these jobbers gave the defendant a bought note which was to be evidence of the contract, and thereupon the defendant sent an advice note to the plaintiff. That was the contract, which if properly reduced into writing might have been a binding contract, that the jobbers would on the account day take these shares if they were then delivered to them. The defendant, therefore, I think, made a contract for the sale of the shares, but he did so without doing or intending to do what is required by the statute, and consequently he failed to do his duty. It is then said on the part of the defendant, that the plaintiff can only recover nominal damages, because if the contract had been in due form, the jobbers would not have been bound to have taken the shares, as the plaintiff could not on the account day, when the bank was being wound up, have given a valid transfer which the bank could have registered. But it seems to me that all the seller was required to do was to deliver shares on the account day, which if the bank had remained solvent would have entitled the purchaser to have had them transferred into his name, and that the seller does not undertake that the banking company shall be a going concern up to the account day. The plaintiff was, therefore, ready to do then all that he was bound to do, and if the jobbers had accepted the shares on that day, they would have been bound to have paid the agreed price, and as the defendant failed to do that which would have compelled them to have taken the shares, the plaintiff lost such price by reason of such failure. With respect to the defendant's liability to indemnify the plaintiff against calls on the shares, in consequence of his remaining the legal registered holder, this has been wisely given up, and the judgment will, therefore, be only for the price of the shares

1882

NEILSON v. JAMES.

COTTON, L.J. The defendant is sued for a loss arising from his negligence in his employment as broker to sell shares for the plaintiff. The answer he makes is that he was employed to sell them according to the rules of the Bristol Stock Exchange, and that he followed those rules and did not make any contract before the 13th of December, but only an arrangement for a contract. Now, in my opinion, that is not correct. According to the cases on the subject what was done was this, the defendant entered into a contract for sale with some jobbers who, although they contracted to be the buyers, did so subject to this peculiarity, that if on the name-day they found another who would buy, they were to be at liberty to substitute the name of such person for their own names. Lord Hatherley said, in *Cruse* v. *Paine* (1), "that *Coles* v. *Bristowe* (2) and *Paine* v. *Hutchinson* (3) had established that in the case of an ordinary sale to a jobber the real contract was that at the settling day he would either take the shares himself or give the names of one or more transferees who could pay for the shares, and to whom no reasonable objection would be taken." Therefore there was in the present case a contract, and the objection taken by the defendant that he did not make a contract cannot prevail. Then it is said that the contract was void because it did not set forth the name of the person in whose name the shares were registered, as required by 30 & 31 Vict. c. 29, and that it is the custom of the Bristol Stock Exchange to disregard the provisions of that Act. If that be the practice on that exchange the sooner it is altered the better; but, in my opinion, the plaintiff is not bound by such a custom, as it is neither reasonable nor legal. There was, I think, negligence on the part of the defendant when he had the opportunity of selling these shares, not to make the contract in such a form as could be enforced. Then comes the question to what amount of damage the defendant is liable. The plaintiff has now given up all claim to an indemnity against calls on the shares, and therefore I think it better to abstain from saying what is my opinion on that point, as it cannot now be judicially decided. As regards the plaintiff's claim for the price of the shares, I think that he is certainly

(1) Law Rep. 4 Ch. 441, at p. 443. (2) Law Rep. 4 Ch. 3.
(3) Law Rep. 3 Ch. 388.

1882

NEILSON v. JAMES.

Cotton, L.J.

entitled to that. It has been said that he could not give a valid transfer, but this is not a case for specific performance, and all that the plaintiff had undertaken to do by the contract for sale was to deliver a duly executed transfer of the shares, and it would be for the purchaser to get the transfer registered. In my opinion there was negligence of the defendant, and in respect of such negligence the plaintiff is entitled to recover damages to the amount of 115*l.* 10*s.*

Appeal allowed.

Solicitors for plaintiff: *Darley & Cumberland.*

Solicitors for defendant: *Merediths, Roberts, & Mills.*

W. P.

[IN THE COURT OF APPEAL.]

April 28.

SUFFELL *v.* THE BANK OF ENGLAND.

Bank of England—Action on Note—Erasure of Number—Material Alteration.

In an action against the Bank of England for the non-payment of notes payable to bearer which had been regularly issued by the bank, it appeared that the notes had been bonâ fide purchased by the plaintiff for value, but that before the plaintiff took them the notes had been altered by erasing the numbers upon them and substituting others, with the object of preventing the notes from being traced, as payment had been stopped and a notice issued specifying their numbers:—

Held, reversing the decision of Lord Coleridge, C.J., that, although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover in his action on them against the bank.

APPEAL from the judgment of Lord Coleridge, C.J., on further consideration (reported 7 Q. B. D. 270).

The question was whether the fraudulent alteration of the number of a Bank of England note was an alteration in such a material particular as to vitiate the note and prevent an innocent holder from recovering thereon.

The plaintiff, who carried on the business of a money changer at Brussels, purchased bonâ fide in April, 1880, sixteen Bank of England notes, ten being for 20*l.* each, and six for 50*l.* each. These notes had been regularly issued by the bank and formed part of fifty notes of 50*l.* each, bearing date the 2nd of July,

1882

SUFFELL v. BANK OF ENGLAND.

1878, numbered 50,501 to 50,550, and of fifty notes of 20*l.* each bearing date the 3rd of September, 1878, and numbered 56,201 to 56,250, which had been given by the Bank of England in April, 1879, in exchange for three bank notes of 1000*l.* each and one for 500*l.*, which had been fraudulently obtained from Smith, Payne, & Co., the bankers. Between the time when these notes of 50*l.* and 20*l.* each had been so received in exchange and the time when they were sold to the plaintiff they were altered by changing the figure 5 to a 3 in the numbers by which they were so numbered. The alteration was made fraudulently, and for the purpose if possible of preventing the notes from being traced, as payment of the notes had been stopped at the bank, and a notice of this with their numbers had been issued.

The Bank of England having refused to pay, the plaintiff brought this action on the notes, which was tried before Lord Coleridge, C.J., at the Guildhall sitting in April, 1881. The jury having been discharged, the cause was reserved for further consideration, and judgment was afterwards given by Lord Coleridge, C.J., for the plaintiff.

The defendants appealed.

April 25. *Cohen, Q.C.*, and *Webster, Q.C.* (*H. D. Greene*, with them), for the defendants. The alteration of the number of a Bank of England note is a material alteration. The number is to identify the note and to enable it to be traced, and without it there would be no mode by which payment of the note could be stopped and notice given of its being stopped. It is essential also for enabling the bank to ascertain what notes are out in circulation. A Bank of England note is different from other promissory notes, and is not to be governed by the same rule as ordinary mercantile contracts. It is made a legal tender for sums above 5*l* by 3 & 4 Wm. 4, c. 98, s. 6, and by 7 & 8 Vict. c. 32, s. 4, the bank is bound to issue a note in exchange for bullion, and the bank of course would be bound to issue it in the usual form, and therefore with a number on it, so that it could be taken as a tender. By 24 & 25 Vict. c. 98, s. 17, it is forgery to engrave, inter alia, any number intended to resemble any part of a Bank of England note, and by s. 12 of that Act it is also forgery to alter any such

note. In *Reg.* v. *Keith* (1), where the prisoner was indicted under 11 Geo. 4 & 1 Wm. 4, c. 66, s. 18, which resembles this s. 12 of 24 & 25 Vict. c. 98, for engraving part of a note purporting to be that of a banking company, it was held that every part of what was usually circulated as a note of such company was part of the note within the statute. In the present case, the number on the notes was altered intentionally, and in order to make the notes represent different notes from those that were issued on the day they were dated. That would make them different instruments, and would be such a material alteration as would vitiate the instruments, although the alteration might not affect the contract: *Pigot's Case* (2); *Master* v. *Miller* (3); *Mackintosh* v. *Haydon* (4); *Burchfield* v. *Moore* (5); *Davidson* v. *Cooper* (6); Leake on Contracts, p. 808. The cases of *Gardner* v. *Walsh* (7), *Catton* v. *Simpson* (8), and *Aldous* v. *Cornwell* (9) only shew that the alteration to vitiate the instrument must be a material alteration. Where there is an alteration of the contract the alteration is necessarily material, but there is no decision, binding at least on the Court of Appeal, that the alteration must alter the contract in order to be material in the sense of vitiating the instrument. On the contrary, if the effect of the alteration is to change the instrument, or its operation, it is a material alteration within the meaning of the rule, but not so if the alteration merely adds something which the law would imply, and which is therefore superfluous: *Calvert* v. *Baker* (10), *Knill* v. *Williams* (11), *Kershaw* v. *Cox* (12), *Trapp* v. *Spearman* (13), *Tidmarsh* v. *Grover* (14), and *Simmonds* v. *Taylor*. (15) That last case was decided before 21 & 22 Vict. c. 79, had made the crossing of a cheque a part of the cheque, and when therefore the effacing the crossing did not affect its validity.

(1) 24 L. J. (M.C.) 110.
(2) 11 Rep. 26.
(3) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.
(4) Ry. & M. 362.
(5) 3 E. & Bl. 683; 23 L. J. (Q.B.) 261.
(6) 13 M. & W. 343; 13 L. J. (Ex.) 276.
(7) 5 E. & Bl. 83; 24 L. J. (Q.B.) 285.
(8) 8 A. & E. 136.
(9) Law Rep. 3 Q. B. 573.
(10) 4 M. & W. 417.
(11) 10 East, 431.
(12) 3 Esp. 246.
(13) 3 Esp. 57.
(14) 1 M. & S. 735.
(15) 4 C. B. (N.S.) 463; 27 L. J. (C.P.) 248.

1882

SUFFELL v. BANK OF ENGLAND.

April 27. *W. G. Harrison, Q.C.*, and *C. H. Anderson*, for the plaintiff. To be a material alteration within the meaning of the rule laid down by *Master* v. *Miller* (1) it must be material to the contract. "Material," said the Master of the Rolls in Ireland, in *Caldwell* v. *Parker* (2), when applied to words for this purpose means, I think, having an effect on some contract or right contained in or arising out of the instrument itself. It does not mean capable of possibly affecting some right or contract which is not created by the instrument." In that case there had been a deed of indemnity given by a debtor to indemnify his sureties against any loss in respect of their being his sureties, and, after the deed had been executed, one of the sureties had drawn a pen through his own signature and that of another surety. The sureties were simply covenantees, and the deed imposed no liability on them. The Master of the Rolls therefore held that such alteration of the deed was not a material one, and did not avoid the deed. In *Trapp* v. *Spearman* (3), Lord Kenyon, who was one of the judges in *Master* v. *Miller* (1), decided that the alteration of a bill of exchange by the addition of the words, "when due at the Cross Keys, Blackfriars Road," was not such as would invalidate the bill in an action on it against the acceptor. In a note to *Cordwell* v. *Martin* (4) it is stated, "words written on a bill which do not affect the responsibility of the parties will not vitiate it," citing *Marson* v. *Petit* (King's Bench sittings after Michaelmas Term, 47 Geo. 3). The cases of *Henfree* v. *Bromley* (5), *Waugh* v. *Bussell* (6), *Trew* v. *Burton* (7), *Collins* v. *Prosser* (8), and *Sanderson* v. *Symonds* (9) furnish instances of alterations which have been held to be immaterial and not to vitiate the instrument, and in those cases the alteration did not vary the contract, or at least was not considered to do so by the judges who decided them. In *Mollett* v. *Wackerbarth* (10) the alteration, which altered the rights of one of the parties, was held to be a material alteration of the contract, and that therefore it avoided it. In the present

(1) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.
(2) Ir. Rep. 3 Eq. 519, at p. 526.
(3) 3 Esp. 57.
(4) 1 Camp. 81.
(5) 6 East. 308.
(6) 5 Taunt. 707.
(7) 1 Cr. & M. 533.
(8) 1 B. & C. 682.
(9) 1 B. & B. 426.
(10) 5 C. B. 181.

case the number on the Bank of England note is immaterial. It is equally a promise to pay the sum mentioned in it whether there be a number or not on the note. It is the same note which the bank issued, and issued for value received, and the bank therefore ought to be bound to pay it. The removal of the number is no more than would be the act of clipping a sovereign, an unlawful act which might subject the person committing it to punishment, but which would not destroy the validity of the note or sovereign in the hands of a bonâ fide and innocent holder.

Cohen, Q.C., replied.

April 28. JESSEL, M.R. This is an appeal from the decision of the Lord Chief Justice of England in a case which raises the very important question, what is the effect of an alteration in the number of a note of the Bank of England as regards the liability of the bank to pay such note to a person who is an innocent holder of it for value. The question is one depending partly upon general law, and partly upon special considerations affecting the peculiar nature of a Bank of England note. It appears to me that the attention of the Lord Chief Justice was not directed to the very important distinction there is between a Bank of England note and an ordinary promissory note, for if it had been I think it is by no means probable that his decision would have been to the same effect that it was. Another point which I think I ought to remark upon is this, that a very large number of cases were cited in the Court below which are not technically binding upon this Court, but which were certainly to a great extent binding on that Court, and it may well be that in differing from the judgment of the Lord Chief Justice, we may be at liberty to do so by reason of that distinction.

I will first of all consider the general law on the subject, which I take to be settled now beyond dispute. The leading case, and which from the time of James I. has always been so treated, is *Pigot's Case* (1), and whatever may be said of the first resolution in *Pigot's Case* (1), no doubt has ever been raised as to the second resolution, which is this, "that when any deed is altered in a point material by the plaintiff himself, or by any stranger without the

(1) 11 Rep. 26.

1882

SUFFELL v. BANK OF ENGLAND.

Jessel, M.R.

privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void." So that even if a single word which is material is erased it destroys the instrument. It was next decided that such rule of law which applied to deeds applied to documents not under seal. The case which decided this was the well-known case of *Master* v. *Miller* (1), decided in the year 1791. There Lord Kenyon, who was Lord Chief Justice of the Queen's Bench, held that the rule which applied to instruments under seal applied to documents not under seal, "because," he said, "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected." Then he added, "The cases cited which were all of deeds were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore, those decisions which were indeed confined to deeds applied to the then state of affairs, but they establish this principle, that all written instruments which were altered or erased should be thereby avoided." Ashurst, J., said this: "Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts whether by deed or not are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax. And a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is that any alteration avoids the contract." I will not read the elaborate judgment of Buller, J., because he was in the minority, and when you want to find out the principle of a decision, it is only necessary to refer to the judgments of the judges who were in the majority, and whose decision it really was. I will therefore pass on to the judgment of Grose, J., which on this point is very plain. "Pigot's is the leading case," he said, "from that I collect that when a deed is erased whereby it becomes void, the obligor may plead non est factum and give the matter in evidence, because at the time of plea pleaded it was not his deed; and, secondly, that when

(1) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.

a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds; but it is said that the law does not extend to the case of a bill of exchange; whether it does or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another." I have read those portions of the judgments, because they state distinctly what the law is. I may mention that that case of *Master* v. *Miller* (1) went to the Exchequer Chamber, and there Eyre, C.J., said: "When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants a duty arises on bills of exchange from the operation of law in the same manner as a duty is created on a deed by the act of the parties." And Macdonald, C.B., added: "I see no distinction as to the point in question between deeds and bills of exchange, and I entirely concur with my Lord Chief Justice in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds." The result therefore is that the law as settled by those cases applied to all instruments in writing without

(1) 4 T. R. 320; in error, 2 Hen. Bl. 141.

1882

SUFFELL v. BANK OF ENGLAND.

Jessel, M.R.

distinction for this purpose between an instrument under seal which is a deed and an instrument without a seal which is not a deed. The only other case in the Exchequer Chamber, and which is strictly binding on this Court, is the case of *Davidson* v. *Cooper* (1), where the action was not on a bill of exchange, but on a guarantee not under seal.

The doctrine in *Master* v. *Miller* (2) has been applied since to various kinds of instruments not under seal, such as bought and sold notes; and it has been fully recognised to be the law of England, and that it is the law is not disputed by the respondent, the plaintiff in this action. The only question we have to determine therefore is, what is a "material alteration," it being indisputable according to the authorities that if there be such a material alteration in the instrument, the instrument is avoided as against the person who would otherwise be liable upon it. The cases are all of extreme hardship, because they assume that the plaintiff is a bonâ fide holder for value, and they all assume that the defendant, without any merit of his own, gets rid of an obligation, at all events as regards that plaintiff, on that instrument.

Now I will first consider whether the alteration in the present case was a material alteration, without regard to the cases on the subject, which are numerous and conflicting, and are besides not technically binding upon this Court. It is alleged on the part of the respondent that in order to be a material alteration within this rule the alteration must in the case of a contract affect the contract, and that where there is no contract but rights are conferred otherwise than by way of contract, those rights must be interfered with. Those are the suggested limits. Upon these two questions arise. First of all, whether those limits are in themselves reasonable and such as should be adopted by the Court of Appeal in all cases; and secondly, whether, if they are reasonable and ought to be adopted, the adoption ought to be limited to the class of cases to which the decisions have been applied. It does not appear to me to be necessary for us now to decide whether those cases have been rightly decided which limit the materiality

(1) 13 M. & W. 343; 13 L. J. (Ex.) 276.

(2) 4 T. R. 320; in error, 2 Hen. Bl. 141.

in the case of an ordinary commercial contract to the subject which affects the contract itself. Whenever it becomes necessary so to decide it will become necessary also to consider whether in the case of such contract there is anything that can by any rational person be treated as material which does not affect the contract. An illustration will point out what I mean. In an ordinary case it may be said that the number put on a bill of exchange or on a cheque will not affect the contract, and may not be a material alteration; but take the case of a debenture issued by a company, or a bond issued by a turnpike trust, or a foreign government, and that the bond is paid according to the number drawn by lot, which is a very common mode of payment; there, although the number would not affect the contract on the face of the instrument, it really would affect the contract in another way, and I should think there would be no doubt in the world that in such a case an alteration in the number would be a material alteration in the instrument. It therefore appears to me, before one can consider the question as to whether the alteration is an alteration affecting the contract one must know exactly what the instrument is, what the alteration is, and what the general effect is, and it may well be that in the majority of these cases (although they may not be all rightly decided, for some of them conflict with others), they may be well decided and yet they may not enable one to decide such a case as this where other considerations arise beside the mere question of contract between the parties.

Now, a Bank of England note is not an ordinary commercial contract to pay money. It is in one sense a promissory note in terms, but no one can describe it as simply a promissory note. It is part of the currency of the country. It has long been made so by Act of Parliament, it is a legal tender for any sum above 5*l.*, and it must be issued to anyone who brings a certain quantity of bullion to the bank, and demands it, as he has a right to do, for the purpose of using it as currency. It is protected in a way no other instrument is protected, against alteration or mutilation, and its preservation in a pure state, to use a term as applied to deeds by some learned judges, is certainly a matter of the utmost importance. It is admitted that the usage of putting the number

1882

SUFFELL v. BANK OF ENGLAND.

Jessel, M.R.

on the note, dates from a long period and is a custom universally known. One must consider the operation of the Act of Parliament which says that any man who produces at the Bank of England a certain quantity of gold bullion shall be entitled to receive bank notes. Could it be contended that the bank wanting to buy bullion and not wanting to increase the circulation of notes, could give to the person who brought the bullion notes without numbers? The man who received the notes in such an unusual form could not make use of them as currency, because no one would take them; and I take it, the Act means a note in the ordinary form in which the bank issues Bank of England notes. I do not mean to say that the Bank of England might not alter its ordinary form, but I mean that it could not comply with the terms of that Act of Parliament unless it issued to the man who so brought bullion notes in the accustomed and ordinary form, so that they would enable him to use them as currency. The number on notes has another important use. It enables the person who receives notes to trace them and so to detect crime as well as to guard against the commission of crime by reason of the knowledge that the notes may be so traced. But the utility of the number does not stop there. We have been told there is a relation between the date and the number which enables the bank more easily, no doubt, to detect forgery if the bank found that relation altered, and also to enable it to keep a register of the notes issued against the notes coming in, so as to ascertain the amount for which the bank is liable. Therefore, knowing the use made of the number, the mode in which it is regarded by the public, and in which it is utilized by the bank, no one could say that the number was not a material part of the note, and, indeed, when I read the judgment of the Lord Chief Justice of England that was obviously his opinion. If, therefore, there is nothing to restrict the generality of the terms used to which I have referred, I should say it was quite clear that the alteration of the number was an alteration of the note in a material part.

I now come to the consideration of the authorities on which alone the Lord Chief Justice determined this case. They related only to ordinary mercantile instruments, and it by no means follows that the same considerations which enabled the judges to

decide what was a material alteration of an ordinary mercantile instrument, would even by those judges have been treated as sufficient to enable them to decide what was a material alteration in the case of a Bank of England note, which, as I have stated, is something more than a mercantile instrument. But what they did decide is this. They said where the alteration made merely states that which the law would otherwise imply that is not a material alteration. I think there would be very little difficulty in acceding to that in the case of ordinary mercantile documents. Then they said, where the alteration does affect the contract either by increasing or decreasing the amount of the obligation of the contracting party sued, that is a material alteration; and then, in some cases, they stated where there is an alteration in a matter which, though it does not directly affect the contract still indirectly does so, that is, affects the position of the parties to the contract, that is a material alteration. With the exception of *Caldwell* v. *Parker* (1) in which there is the obiter dictum of the Master of the Rolls in Ireland, I cannot find any case in which the doctrine has been laid down in terms such as those stated by the Lord Chief Justice of England in the course of his judgment in the present case, viz.: "It has always been held that the alteration which vitiates an instrument must be a material alteration, i.e., must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of." And his Lordship then cites certain cases as "clear authorities to shew that an immaterial alteration will not do." I am by no means satisfied that what is so stated is incorrect as regards an ordinary commercial instrument which contains nothing but a contract. As I said before, it is difficult to see how in such a case an alteration could be material if the alteration did not affect the contract; but there may be such a case, and I expressly reserve to myself the right of saying if such a case should ever occur it has not been decided by the authorities referred to. Again, I agree that the case of *Caldwell* v. *Parker* (1) goes somewhat further, but I decline to say anything disrespectful of that case, except that I disagree with it. It was a decision arrived at by

(1) Ir. Rep. 3 Eq. 519.

1882

SUFFELL v. BANK OF ENGLAND.

Jessel, M.R.

the Master of the Rolls in Ireland, as he states with great doubt, and, at all events, it is not a decision which is binding on this Court. It seems to me on the whole, therefore, that there is no authority binding upon us to limit the materiality of an alteration so as to exclude this case from the general law, and that there are very strong and, to my mind, unanswerable reasons for holding this case to be within the general law, and that whatever hardship our decision may inflict upon the plaintiff we are bound to hold, as we do, that the defendants should succeed in this appeal.

BRETT, L.J. In this case the plaintiff, for value and with perfect innocence, bought several bank notes which had been issued by the Bank of England, and the question is whether the plaintiff, the bonâ fide proprietor of these notes, can recover from the bank the sum for which those notes were issued; or whether the bank, although they had received full value for the issue of every one of these notes, can nevertheless decline to pay the sum which by the issue in each case they undertook to pay to the person who should present the note. If the Bank of England be not bound to pay such sum to the plaintiff it is obvious that a great hardship will be inflicted upon the plaintiff, who will lose his money. And it equally follows that the bank will escape their liability to pay the very sum which by the note when it was issued they undertook to pay. I ought to state that after these notes were issued the number of each of them was altered by a person in whose possession such note was for the moment. How these notes came into the possession of such person does not seem to be disclosed, but according to the facts found by the Lord Chief Justice, such person purposely altered one of the figures in the number of each of the notes with a fraudulent intention and for the purpose of preventing its being traced. It seems to me that the material point is that such alteration was purposely done. It has been argued for the plaintiff, that although that was purposely done, it does not relieve the bank from its liability to pay an innocent holder: first, because the alteration was done by a stranger to the note, and, secondly, because the alteration, by whomsoever it was done, does not affect the contract contained

in the note, and therefore is an immaterial alteration. On the other side, it has been contended that the alteration was made in the bank note by a person who was in possession of it, and who, therefore, whether he had or not stolen it, could have forced the bank if there had been no alteration to pay it, and assuming the alteration does not alter the contract contained in the note, yet it is such as would have affected its identity, using the word "identity" in a manner which I will presently consider. It was further urged that where the instrument is either not a contract at all, or is a contract and something more than a contract, an alteration made of that instrument may be material although it does not affect the contract contained in it, and that in this case there is a material alteration, although it does not affect the contract.

Now, I think it is clear that a Bank of England note itself contains a contract which is ambulatory by reason of the mere passing of it from hand to hand. It is a contract to pay the amount of the note to whomsoever may present it, and such person can enforce that contract by an action. But then I think that such bank note is something more than an instrument containing a contract, or what is evidence of a contract only, it is a thing which is in itself valued as money and as currency. I agree with the argument on the part of the plaintiff that the alteration in this case has not in any way affected the contract. The number on the note is no part of the contract, and therefore if the rule of law insisted upon by the plaintiff be a true rule, viz., that it is only an alteration which affects the contract which vitiates an instrument, then the plaintiff would be entitled to recover. The question therefore must be whether that rule applies further than to an alteration of a contract in an instrument, and if it does, whether the alteration in these notes, which does not affect the contract contained in them, is nevertheless a material alteration. I think the plaintiff is also right in this, that whatever the instrument may be to which the rule is applicable the rule is only applicable where the alteration is material, leaving open the question to be considered what is a material alteration. I incline to think, but it is not necessary to determine this now, that where an instrument contains only a contract,

1882

SUFFELL v. BANK OF ENGLAND.

Brett, L.J.

or can only be used as evidence of a contract, no alteration of such an instrument which does not alter or affect the contract, can be a material alteration. But I think the rule is not confined to instruments which contain only a contract. I think it is applicable to instruments which contain no contract at all; and if that be true, then it follows of course with regard to instruments which contain no contract at all, that the alteration, which is to be a material alteration, cannot be confined to an alteration of what affects the contract. I incline to think with regard to instruments which either contain the contract and something more, or which do not contain the contract at all, that the rule may be thus stated—whenever any instrument is purposely altered by a person in lawful possession of it in a material part of it, the instrument is void for the purpose of enabling any person to sue on it or to defend himself by using it as a direct defence depending on its obligatory force as an instrument. I put in those cautionary words myself, because I am not sure that, although an instrument may be avoided for the purposes which I have mentioned, nevertheless it may be used for other and collateral purposes, as for instance, by way of proving or enforcing an admission where the instrument itself is not used either for the purpose of its being sued upon or for the purpose of its being used as a direct defence in the terms which I have stated. But whenever it is within the terms which I have stated, then it seems to me any material alteration in it avoids it for those purposes although that alteration does not alter any contract in it. That, however, leaves open the question what is a material alteration in such an instrument. Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used.

If that be true, then the question arises whether the alteration of the number of a Bank of England note comes within that definition. I have already stated that in my opinion such alteration does not alter or affect the contract contained in the note, but the number does seem to me to be a material part of the instrument, and to be used in ordinary business as a material part of that instrument for business purposes. It is put there by the Bank of

England for purposes as I might say within the bank itself. I am not sure whether if that were the only purpose for which it is used an alteration of it could be said to be a material alteration within the definition I have stated; but it is important in a business sense, and it is certainly used or may be used by everybody into whose hands the note comes. It seems to me that as long as all their notes are marked with a number the defendants could not issue any particular bank note without a number, and for this reason, because the person entitled to demand from them the issue of a note is entitled to have a note which will pass as currency without question or doubt, which would not be the case with respect to a bank note without a number originally upon it. The number is also most undoubtedly useful for the purpose of tracing the note in case of accident, and I will not say that there are not other business purposes for which such number may be used. It seems to me that these instances are enough to shew that the number is a part of the note used in ordinary business for a business purpose. Then it seems to me that an alteration of part of such an instrument as that is within the definition and is a material alteration. I do not rely upon the alteration of the identity of the note, if "identity" is to be used in the sense that the alteration alters the physical appearance of the document, because it seems to me that an alteration on the face of an instrument which is admitted to be an immaterial alteration does nevertheless alter the "identity," if identity is used in the sense of physical appearance. My view is that in *Sanderson* v. *Symonds* (1) the judges used the word "identity" as meaning identity in the case of a contract, and that therefore it really only came to the same thing as saying that there must be an alteration of the contract which is a material alteration of the effect of the contract. If there is an alteration which affects the legal effect of the contract, it is obvious that the two contracts then are not identical, and I cannot help thinking that is what the judges there meant.

The question is whether we are right in extending the rule to such an alteration as we are now considering in a Bank of England note. It has been argued that the doctrine has been confined to

(1) 1 B. & B. 426.

1882

SUFFELL v. BANK OF ENGLAND.

Brett, L.J.

cases where the instrument contained a contract, and it was stated that in the case relied on, *Master* v. *Miller* (1), there was a contract and an alteration of the contract. The action there was brought upon a bill of exchange, and the alteration was in the date of such bill. Therefore the action was brought upon an instrument containing a contract, and to my mind containing nothing else, and the alteration altered the effect of that contract, therefore so far as the decision goes, it is only a binding authority upon a Court of co-ordinate jurisdiction that an alteration in a contract which alters the effect of that contract is a material alteration, and vitiates that instrument. It seems to me that the principle laid down in *Master* v. *Miller* (1) extends in its application beyond an instrument which contains only a contract. The words which Lord Kenyon uses are certainly larger than would apply only to contracts, because the words are "all written instruments which were altered or erased," and one must here read in "in a material part" "should be thereby avoided." I do not think that the judgment of Ashurst, J., applies to other than instruments containing a contract. With regard to Buller, J., it is immaterial to consider what he said because his opinion did not prevail, but I think that that which Grose, J., says is very material. "A deed," he says, "is nothing more than an instrument or agreement under seal, and the principle of these cases"—that is, of the cases previous to *Master* v. *Miller* (1)—"is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument." He afterwards shews that he intended to extend this to something more than an agreement, because he says, "This principle too appears to me as applicable to one kind of instrument as to another." I think, therefore, that he intended to comprise within the doctrine instruments which were not contracts as well as those which were only contracts. Then the case cited to us of an alteration in an award, namely, *Henfree* v. *Bromley* (2), certainly carried the matter beyond an alteration in instruments which were mere agreements, for the alteration there certainly did not affect the contract, and yet it was held that it avoided the instrument. The case which I ventured to suggest of an alteration in the statement of the

(1) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857. (2) 6 East, 308.

consideration given at the time of the giving of a bill of sale certainly would not alter the contract, because whatever the consideration was the contract would be the same, but I cannot doubt myself that where there is such an alteration of such statement as would affect the validity of the registration of the bill of sale it must be within the principle laid down, and would be an alteration which would avoid the bill of sale. Both principle and authority seem to me to shew that the doctrine is to be applied to all instruments in which there is a material alteration, and that the alteration may be material although there may be no contract in the instrument, or if there be, it does not alter such contract. I am, however, inclined to admit that if the instrument contains nothing but a contract, and has no legal or business effect whatever except as a contract, that then there could be no material alteration in the document unless that alteration did alter the contract. With regard to what was expressed by the Master of the Rolls in Ireland in *Caldwell* v. *Parker* (1), I can only say that I cannot as at present advised bring my mind to think that that case was decided according to law.

COTTON, L.J. In this case the plaintiff is a bonâ fide holder for value of certain Bank of England notes, on which he sues the Bank of England. There is no imputation on him with regard to the way in which he took those notes, but the question which we have to consider is this, whether in consequence of certain alterations which were made in those notes, intentionally, and evidently for the purpose of preventing them being traced, the plaintiff, in accordance with the rules of law long established in this country, has lost his right to sue upon them. Now the rule which is relied upon by the Bank of England is that which is laid down in *Pigot's Case* (2), namely, that a deed is void when it is altered in a point material. That was only as regards a deed, but the rule so laid down was afterwards extended in *Master* v. *Miller* (3) to instruments not under seal, and following that case, it has been well established that the principle so laid down extends to negotiable instruments, and that a bonâ fide holder for value cannot

(1) Ir. Rep. 3 Eq. 519, at p. 526. (2) 11 Rep. 26.
(3) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.

1882

SUFFELL v. BANK OF ENGLAND.

Cotton, L.J.

recover on them when there has been an alteration in the instrument coming within such principle. The question is, whether a material alteration is confined to an alteration which is material because it alters the contract in the instrument. Now that certainly is not the language of the rule in *Pigot's Case* (1), nor of the rule as adopted and applied to instruments not under seal, in *Master* v. *Miller* (2), and, with the exception of the case in Ireland, *Caldwell* v. *Parker* (3), no case has been referred to in which the judges have so restricted the rule that the materiality must be material in the sense of altering the contract. I do not think it necessary to consider that case of *Caldwell* v. *Parker* (3), but I agree in thinking that it is not a right decision, and I certainly do not feel bound to follow it.

Now, that being so, there is no decision, certainly no series of decisions, that the material alteration is restricted in the way contended for by the plaintiff, and one does not find from the judgments from which one must gather the principle on which the cases were decided, that the rule was so limited. Grose, J., puts his judgment in *Master* v. *Miller* (2) on this, not an alteration of the contract but an alteration of the instrument, so that it is no longer to be considered as the same instrument. "A deed," he says, "is nothing more than an instrument or agreement under seal, and the principle of those cases is that any alteration in a material part of any instrument or agreement, avoids it because it thereby ceases to be the same instrument." Of course, it is not every small alteration in an instrument which will prevent it being the same. It must be a material alteration, so that the party defending himself may be able to say that it is not the same instrument as that which he executed or to which he put his hand. Then what was said by Dallas, L.C.J., in *Sanderson* v. *Symonds* (4), was this: "The original rule was not intended so much to guard against fraud as to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned." Not to prevent an alteration which would make a different contract, but to insure the instru-

(1) 11 Rep. 26.

(2) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.

(3) Ir. Rep. 3 Eq. 519.

(4) 1 B. & B. 426, at p. 430.

ment being in substance the same, and to prevent the parties substituting that which was not the same but a different instrument. The judgment of Richardson, J. (1), is somewhat more ambiguous, because he says "the ground on which the cases have turned is that the alteration has varied the identity of the contract," using that ambiguous word "contract," which may either mean the instrument containing the contract or the contract contained in the instrument. Then there is the case of *Knill* v. *Williams* (2), where the only alteration in the promissory note was the addition to "value received" of the words "for the goodwill of the lease and trade of Mr. F. Knill." It was argued by Mr. Harrison, when I called his attention to that case, that the alteration there was an alteration of the contract, and therefore came within the principle for which he was contending. But when one looks at the judgments of Lord Ellenborough and Grose and Bayley, JJ., that is not the ground of their decision. Lord Ellenborough says, by way of illustration, "If a bond, for example, were conditioned for the payment of money generally, could it afterwards be introduced by way of recital that the money had been advanced out of a particular fund which might afterwards be made use of for other purposes?" Clearly shewing, that the principle of his decision was that the alteration must be such an alteration of the instrument as would make it substantially different, and which although it would not affect the contract, would affect the rights of the parties in other matters. Then he says, "The effect of the alteration is to narrow the value from value received in general to the value expressed; which I cannot say is not a material alteration." Then what Grose, J., says, is this: "The question is, whether the alteration introduced made it a different note. If it be material, it is a different note; and it certainly is material, for it points out the goodwill and trade of F. Knill as the particular consideration for the note, and puts the holder upon inquiring whether that consideration had passed." Bayley, J., says "The case of *Master* v. *Miller* (3) decided that an alteration in a material part of a bill after it has issued makes a new stamp necessary, and this was a material alteration, for it was evidence of a fact which, if necessary to be inquired into, must otherwise have been proved by

(1) 1 B. & B. at p. 432.
(2) 10 East, 431.
(3) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.

1882

SUFFELL v. BANK OF ENGLAND.

Cotton, L.J.

different evidence." So that even if it could be said that that was an alteration in a particular contract in that case, that is not the ground on which the judges put their decision.

Then there is the case of *Simmonds* v. *Taylor* (1) as to a crossed cheque. There the Exchequer Chamber decided that the erasing of the crossing did not vitiate the cheque. That decision was on the ground that the erasing was not a material alteration even if the crossing was part of the cheque, but that it was not part of the cheque but a mere superadded direction to the banker, and did not come within the statute of 19 & 20 Vict. c. 25. The erasing the crossing did not avoid the instrument as it was no alteration of the instrument but only a removal of a superadded direction; that decision, therefore, cannot in my opinion assist the plaintiff. No doubt there is a long string of cases which do as a rule deal with the question whether the contract contained in the instrument has been altered or not, as the test by which to decide whether the alteration be a material one within the rule in *Pigot's Case* (2), and the plaintiff did, as he was entitled to do, rely on that most strongly; but the question whether an alteration of an instrument is a material one must, in my opinion, depend upon the nature of the instrument and the uses to which it is to be put, and, although in these cases, the proper test may have been whether the contract contained was altered or not, it by no means follows, unless it has been so laid down, that the rule is that the alteration in the contract is essential and that no other alteration will do. In my opinion that conclusion would be incorrect. The question here is whether the alteration, although not an alteration of the contract, is nevertheless an alteration of the instrument in a material way. Having regard to the nature of the instrument and the purpose for which it is used, one cannot see why one is to confine the alteration which has been laid down in general terms as a material alteration in the two cases to which I have referred, *Pigot's Case* (2) and *Master* v. *Miller* (3), to an alteration of the contract. In my opinion it is not a question of the alteration of the contract, but a question of the alteration of the instrument in a material way. Now, in this case we have a well-

(1) 4 C. B. (N.S.) 463; 27 L. J. (C.P.) 248.

(2) 11 Rep. 26.

(3) 4 T. R. 320; 1 Sm. L. C. 8th ed. p. 857.

known thing, viz., a Bank of England note, which is under an Act of Parliament part of the circulating medium of the country, and as regards the issue of which the Bank of England is subject to restrictions in its operation. What has been done is this, certain numbers which are always stamped on the notes of the Bank of England before they are issued have been altered by a holder, undoubtedly intentionally and for a particular purpose. Now can it be said that such numbers are not an essential part of the note? They have been recognised as essential for years, so that no one would take a Bank of England note if such numbers were not upon it. The numbers, with the date, enable the Bank of England and the public to identify the notes. Persons wishing to protect themselves as far as they can against the loss of Bank of England notes make a memorandum of the date and numbers, and in case of loss they give notice to the bank of the numbers of the notes which have been lost, and the bank then stops them and endeavours to prevent their circulation by sending round notice of the numbers of the notes stopped to persons likely to take them. The numbers are therefore essential for this purpose and also for the protection of the bank against forgery, because it enables it to see whether it has issued a note of that date and number which is presented to it for payment. By these numbers the bank can know what notes are still in circulation, because when they come in they are not issued again. Therefore the existence of the numbers on the notes affords both to the bank and the public a most material protection. Having regard then to the nature of the instrument and to the purpose for which these numbers are used and are put on the note, I am of opinion that they must be considered as an essential part of the note, and that by altering them the person who did it has made a material alteration of the instrument within the rule laid down by the cases to which I have referred, and therefore that the defence of the Bank of England in this case must prevail.

Judgment reversed.

Solicitor for plaintiff: *H. J. Comyns, agent for J. Rand Bailey.*
Solicitors for defendants: *Freshfields & Williams.*

W. P.

1882

May 22.

WILLIAMS *v.* WALKER.

Husband and Wife—Post-nuptial Contract—Contract by the Wife with the Husband in respect of her Real Estate—3 & 4 Wm. 4, c. 74, ss. 77, 79.

A married woman immediately after the marriage, and in consideration thereof and of her husband undertaking the management of lands and tenements of which she was seized in fee, and of his paying off incumbrances and defraying the expense of managing and keeping the premises in repair, verbally agreed to convey the lands and tenements to him, and to settle them upon him absolutely, and to do all such acts as might be legally necessary for effectuating such conveyance and settlement. The husband performed his part of the agreement, but the wife died without having executed or acknowledged a deed:—

Held, that this contract could not be set up as an equitable defence to a claim by her heir-at-law to recover the land.

STATEMENT OF CLAIM. Thomas Williams, the great grandfather of the plaintiff, by his will, dated the 26th of February, 1856, devised the tenement now used as a beer-house and known by the name of the Castle Inn, together with the land, out buildings and appurtenances thereto belonging, situate at Pentre Broughton, Wrexham, Denbighshire, to his wife Hannah Williams for life, remainder to his daughter Hannah Parry, then the wife of John Parry, in fee.

2. Thomas Williams died on or about the 12th of November, 1860, being then possessed of the aforesaid tenement.

3. The will of Thomas Williams was duly proved by Hannah Williams, his widow, on the 29th of May, 1861.

4. Hannah Williams died on or about the 2nd of April, 1862, being then possessed of the aforesaid tenement.

5. John Parry died on or about the 26th of July, 1876.

6. Hannah Parry, the widow of John Parry, in September, 1878, married the defendant William Walker.

7. Hannah Walker died on or about the 8th of November, 1881, without issue, while in occupation and possession of the aforesaid tenement and of the two pieces of land hereinafter mentioned.

8. John Parry, by his will, dated the 22nd of April, 1876, devised all his real property to his wife, the aforesaid Hannah Parry, absolutely.

9. The will of John Parry was proved by Hannah Walker, then Hannah Parry, on the 26th of August, 1876.

10. John Parry was at the date of his will possessed of the two pieces of land situate at Broughton sought to be recovered in this action.

11. The plaintiff is the heir-at-law of Hannah Walker, formerly Hannah Parry, and as such is entitled to the possession of the aforesaid tenement.

12. The defendant has since the death of his said wife Hannah Walker remained, and still remains, in occupation and possession of the aforesaid tenements, and has refused and still refuses to give up possession of the same to the plaintiff, although such possession has been demanded from him.

The plaintiff claims, 1. Possession of the aforesaid tenements; 2. Mesne profits from the 8th of November, 1881, until possession.

Defence. 1. The defendant says that he is in possession of the tenements and lands of which possession is claimed in this action.

2. Without prejudice to any defence which he may be entitled to set up by virtue of the last preceding paragraph, the defendant says as follows:—In or about September, 1878, the defendant married Hannah Parry who was then seised in fee of certain lands and tenements including those of which possession is claimed in this action. At the date of the defendant's marriage aforesaid, Hannah Parry had been keeping the Castle Inn, and had mortgaged the same to one Joseph Williams, and there was then due and owing to Joseph Williams under such mortgage the sum of 150*l.* and 7*l.* 10*s.* for interest. There were also debts owing by Hannah Parry for beer and other goods supplied for consumption at the Castle Inn amounting in all to about 210*l.* Hannah Parry had then no money, nor any stock on the premises.

3. Immediately after the defendant's marriage with Hannah Parry (hereinafter called Hannah Walker), and in consideration thereof and of his undertaking the management of the said lands and tenements, and of his paying off the debts aforesaid and defraying all expenses which might thereafter be incurred in managing and keeping in repair the said lands and tenements,

1882

WILLIAMS v. WALKER.

the said Hannah Walker agreed to convey the said lands and tenements to the defendant and to settle them upon him absolutely, and to do all such acts as might be legally necessary for effectuating such conveyance and settlement.

4. The defendant, in pursuance of the agreement aforesaid, entered into possession of the said lands and tenements and received the rents and profits thereof. The defendant also managed all things connected with the said land and tenements, and expended at various times upon repairs and similar expenses sums of money amounting in all to about 50*l*. The defendant also in pursuance of his said agreement paid off all the debts aforesaid with the exception of one, part of which is still unpaid and for the payment of which the defendant is liable. The mortgage debt and interest aforesaid were paid out of the proceeds of the sale of part of the said lands and tenements during the life of the said Hannah Walker.

5. By reason of the above mentioned agreement and the performance thereof by the defendant as aforesaid, the defendant became entitled to have the aforesaid conveyance or settlement in his favour executed by the said Hannah Walker; but the said Hannah Walker died without having executed the same. The defendant contends that he is now entitled to enforce against the plaintiff as heir-at-law of Hannah Walker specific performance of the said agreement; and the defendant therefore says that the plaintiff is not entitled in equity to claim possession of the said lands and tenements.

Reply and Demurrer. 2. The plaintiff says that the alleged contract between the defendant and his late wife Hannah Walker set out in the statement of defence, if made (which he does not admit), is not binding in law or equity, because not evidenced by writing, as required by the Statute of Frauds.

3. The plaintiff also demurs to the second, third, fourth, and sixth paragraphs of the statement of defence, on the ground (amongst others) that the defence there set up is founded upon an alleged agreement or contract between the defendant and his late wife Hannah Walker which in law they could not make, and which cannot either at law or in equity be enforced against the plaintiff as heir-at-law of Hannah Walker.

1882

WILLIAMS v. WALKER.

May 22. *Clement Higgins*, in support of the demurrer. The agreement set out in the third paragraph of the statement of defence,—a verbal agreement alleged to have been made between husband and wife during the coverture, whereby she agrees to settle upon him property of which she was seised in fee absolutely—is not one upon which an action could have been maintained either at law or in equity by the husband or his representatives against the wife, and consequently not one of which specific performance can be enforced against the plaintiff. It is contrary to first principles for a wife to convey or to contract to convey real property to her husband, except by marriage-settlement. Consequently, upon the death of Hannah Williams, the property in question became vested in the plaintiff as her heir-at-law.

M'Morran, contrà. The second, third, fourth, and fifth paragraphs of the statement of defence disclose a good equitable defence to the plaintiff's claim. They shew an agreement between the defendant and his wife which was perfectly valid and capable of being enforced, and of which there has been a part performance on his part. In Story's Equity Jurisprudence, vol. ii. § 1372, it is said: "In regard to contracts made between husband and wife after marriage, à fortiori the principles of the common law apply to pronounce them a mere nullity; for, there is deemed to be a positive incapacity in each to contract with the other. But here again, although Courts of Equity follow the law, they will under particular circumstances give full effect and validity to post-nuptial contracts. Thus, for example, if a wife having a separate estate should bonâ fide enter into a contract with her husband to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, would be held obligatory and would be enforced in equity. So, if the husband should for good reasons contract with his wife that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in equity. So, if a husband and wife for a bonâ fide and valuable consideration should agree that he should purchase land and build a house thereon for her, and she should pay him therefor out of the proceeds of her own real estate; if he should perform the

1882

WILLIAMS v. WALKER.

contract on his side, she also would be compelled to perform it on her side." The law is similarly laid down in Bishop's Laws of Married Women, § 604; Smith's Real and Personal Property, 4th ed. p. 1124. Here, the wife, for a good consideration, agreed to settle the lands in question on her husband. That agreement was enforceable in equity against the wife, and may equally be relied on as a defence against her heir-at-law.

Higgins, in reply. No doubt, if the proper steps had been taken in the lifetime of the wife, the property might have been vested in the husband. But the question is whether the contract alleged in the third paragraph of the statement of defence is one that can be enforced in equity. There is no authority to support that proposition. There was no separate property here. The wife was seised in fee at the time of her marriage. She could not have contracted with a third person to convey it; neither could she contract with her husband.

[MANISTY, J. Are there no authorities on the subject save the text-books?]

None which throw any light upon it; but, for the general principle, *Willock* v. *Noble* (1) and *Teasdale* v. *Braithwaite* (2) may be referred to. The Act for the abolition of Fines and Recoveries, 3 & 4 Wm. 4, c. 74, applies as well to equitable as to legal estate: s. 1. This is in effect an attempt to evade the provisions of ss. 77, 79 of that Act.

MANISTY, J. No doubt the plaintiff is entitled to recover the property in question, unless the contract set out in the third paragraph of the statement of defence,—that, after the defendant's marriage with Hannah Parry (the then owner in fee), and in consideration thereof and of his undertaking the management of the said lands and tenements, and of his paying off certain debts and defraying all expenses which might thereafter be incurred in managing and keeping in repair the said lands and tenements, the said Hannah Walker *agreed to convey* the said lands and tenements to the defendant, and to settle them upon him absolutely, and to do all such acts as might be legally necessary for effectuating such conveyance and settlement,—constitutes in equity an answer

(1) 44 L. J. (Ch.) 345. (2) 4 Ch. D. 85; 5 Ch. D. 630.

to the plaintiff's claim. The case is peculiar in this respect, that it is not an action by the husband for specific performance; but he is, after his wife's death, setting up a contract to the effect above stated, and alleging that he has performed it on his part. No doubt, in equity, a contract to do a thing is the same as if it had actually been done. But if during her lifetime the wife had by deed conveyed the property to her husband without complying with the provisions of 3 & 4 Wm. 4, c. 74, that deed would have been void. The object of the Act was to protect married women from being swayed by the undue exercise of marital influence; and, even though the husband joined in it, a deed unacknowledged would equally be void. I must confess I do not see any answer to that. The contract relied on here could not have a greater effect than a deed would have had. If it could, the Act of 1832 would be rendered of no effect. Upon that short ground I think this demurrer must prevail.

It is unnecessary to go into the general question. It would be strange indeed if the evidence of the husband should be the only evidence of the making of such a contract as this. Upon either ground, therefore, it might well be held to be contrary to first principles to allow such a contract to prevail.

WATKIN WILLIAMS, J. I am of the same opinion. A married woman during coverture, as well in equity as at law, is under a legal disability to convey her real estate; and, unless the provisions of 3 & 4 Wm. 4, c. 74, are complied with, a deed executed by her for the purpose, and à fortiori a parol contract by her, is void. There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Kennedy, Hughes, & Kennedy, for J. Allington Hughes, Wrexham.*

Solicitors for defendant: *Hamlin & Grammar, for J. P. Cartwright, Chester.*

J. S.

1882
Aug. 8.

BALDWIN & CO. *v.* THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Carrier—Liability for Delay in Transmission of Goods—Measure of Damage.

On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were forwarded to another place, and did not reach the W. station until the 4th of January, 1882, when, finding them to have become heated (through being packed in a damp state) and therefore unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed.

There being an admitted breach of duty on the part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiffs' own act in packing the rags in a damp state, without informing the defendants that special care was necessary.

Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods:—

Held, that the ruling of the judge was correct.

THE plaintiffs sued the defendants for 43*l.* 6*s.* 8*d.* damages for wrongful conversion of eighteen bales of rags, and for the like damages for breach of contract.

At the trial before the judge of the Southwark County Court, it appeared that on the 19th of December, 1881, the plaintiffs delivered to the defendants in London eighteen bales of rags of the value of 43*l.* 6*s.* 8*d.* to be conveyed to Messrs. Monckton at the Wrotham station, at which place it was admitted that they would in the ordinary course of business arrive within twenty-four hours. By mistake they were sent to another station, and did not reach Wrotham station until the 4th of January, 1882. On that day the station-master at Wrotham wrote to the plaintiffs informing them that "the rags had been traced, and that endeavours were being made to induce Messrs. Monckton to accept them:" and on the 7th the station-master again wrote to the plaintiffs informing them that the rags had been refused by Messrs. Monckton in consequence of "the quality not being suitable," and requesting instructions as to the disposal of them. The plaintiffs declined to give any instructions, and the rags, having

been packed in a damp state, heated and rotted and became such an intolerable nuisance that the defendants were obliged to and did destroy them.

It appeared by the evidence of the plaintiffs that rags packed in a damp state will heat and rot in a few days (much less than a fortnight), and become worthless except for manure; and that in the month of January they could not be sold even for that purpose: but that rags packed dry would not be injured by a delay of six months or even more.

It was admitted by the plaintiffs that the defendants had no notice that the rags were packed in a damp condition, the bales being merely described as "Rags."

Upon these facts the county court judge nonsuited the plaintiffs so far as regarded the claim for a wrongful conversion; and, relying upon the rule laid down in *Hadley* v. *Baxendale* (1), he directed a verdict and judgment to be entered for the plaintiffs on the second head of claim, but for nominal damages only,—observing that although, as far as he knew, the rule had hitherto been applied only to the loss of profits by delay in the transit of the goods, he could see no reason why it should not apply also to loss or depreciation in respect of the goods themselves through the same cause. And, further, that the proximate cause of the loss of the goods was the improper condition in which they were packed, and not the delay.

Aug. 8. *Gaskell* moved to increase the damages to 43*l.* 6*s.* 8*d.*, the admitted value of the rags at the time when they ought to have been delivered to Messrs. Monckton. The true measure of damages in an action against a carrier for the non-delivery of goods in a proper and reasonable time is the difference between their market price at the time at which they ought to have been delivered, and their market value at the time of delivery to the consignee and in their then condition. If in consequence of the delay the goods are destroyed or lessened in value, the extent to which they are so deteriorated is the proper measure of the carrier's responsibility: *Illinois Central Ry. Co.* v. *M'Clellan.* (2) That was an action for not delivering corn within a reasonable time, whereby

(1) 9 Ex. 341. (2) 54 Ill. Rep. (American) 58.

1882

BALDWIN v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

it became heated and spoiled. And see 2 Sedgwick on Damages, 7th ed. 115.

[MATHEW, J. The company had a right to assume that the bales contained dry rags, not damp. The plaintiffs gave them no notice that they were in a condition to be destroyed by a delay of three weeks.

CAVE, J. No harm would have happened to the rags if they had not been delivered to the defendants in a damp state. The result, therefore, can hardly be said to be such as would be in the contemplation of the parties.]

In *Hooper* v. *London and North Western Ry. Co.* (1), the plaintiff's portmanteau containing a brace of pheasants was delivered by the company three months after the proper time, and he recovered 15*l.* agreed damages for the injury done to the other contents of the portmanteau. It was never suggested that it would be a case for nominal damages only. If the defendants had performed their contract, the damage here complained of could not have occurred.

MATHEW, J. I think the decision of the county court judge was quite right. The true measure of damages in a case of this kind is that which may fairly be said to have been in the contemplation of the parties at the time as the natural consequence of a breach of contract on the part of the defendants. The goods in question were not delivered or tendered to the consignees until fourteen days after the time at which they ought to have been delivered. What were the natural or necessary damages resulting from that delay? If the rags had been dry when delivered to the company, the damage would have been nil. The rags however were then damp, and hence their destruction. But the company did not know they were damp. It was the duty of the plaintiffs to inform the company at the time, if special care were required in dealing with the rags. The point was not raised in *Hooper* v. *London and North Western Ry. Co.* (1)

CAVE, J., concurred.

Rule refused.

Solicitors for plaintiffs: *Keene, Marsland, & Brogden.*

(1) 50 L. J. (Q.B.) 103.

J. S.

SMITH & SON, APPELLANTS; THE ASSESSMENT COMMITTEE FOR THE PARISH OF LAMBETH, RESPONDENTS. 1882 *June* 26.

Poor-rate—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67)—*Rateable Hereditaments—Bookstalls on a Railway Platform—Exclusive Occupation—Exclusive Enjoyment—Licence or Demise.*

By indenture the South Western Railway Company granted to Smith & Son (therein called "the tenants") for seven years "the sole and exclusive licence and privilege to vend, sell, lend, and exhibit for sale and loan, newspapers, books, periodicals, stationery, &c., and such other like articles required for the convenience of passengers by railway as should be approved by the secretary of the company, at all their stations," &c.; and also full liberty for the tenants, subject to the approval of the engineer of the company, to erect and place bookstands, &c., on the platforms for exhibiting and keeping their books, &c., and to post and exhibit advertisements and placards on the station walls; and also full and free ingress and egress at all reasonable times for the tenants, their servants and agents, to and from the several stations for the purposes of the grant. The persons employed by Smith & Son were to be under the control of the station-master and liable to immediate removal from the station in case of insobriety or misconduct. S. & Son were to pay the company certain fixed monthly rents, and also a percentage (quarterly) on the gross amounts received by S. & Son for the posting of the advertisements, &c.,—with a proviso that, in case the rent or the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the company, in addition to any other remedies, "by distress as in the case of rent in arrear." And it was provided that the tenants should not vend or offer for sale, or exhibit or publish, any books or advertisements or placards of an indecent, immoral, or seditious character, or which should be forbidden by the company; and should abide and observe the regulations from time to time made by the company touching the placing on the platforms any of the necessary bookstands; and the company warranted to the tenants "the quiet and peaceable enjoyment and benefit thereby granted for the period and upon the terms and stipulations and in manner aforesaid."

S. & Son erected bookstands upon four several platforms at the Waterloo station, and had the exclusive possession and use of them; and these bookstalls were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress and egress to and from the station, or of access to the bookstalls, were exercised by S. & Son or their agents or servants, except under the provisions and for the purposes of the indenture. The company were assessed to the poor-rate for the station generally:—

Held, that S. & Son had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstalls.

Affirmed 10 QBD 328 C.A.

CASE stated by consent under 12 & 13 Vict. c. 45, s. 11, on a return to a mandamus to the general quarter sessions for Surrey, commanding them to enter continuances and to hear and determine

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

the merits of certain appeals against a rate or assessment for the relief of the poor of the parish of Lambeth:—

1. The appellants are booksellers, librarians, stationers, and news and advertisement agents carrying on business under the style or firm of W. H. Smith & Son, their principal place of business being at No. 186, Strand.

2. The respondents are the assessment committee for the parish of Lambeth and the churchwardens and overseers of the poor of that parish. The Waterloo station of the London and South Western Railway Company hereinafter mentioned is situate within the parish of Lambeth.

3. Shortly after the 18th of February, 1880, the appellants received notices of that date in respect of the several bookstalls hereinafter mentioned, which are situate at the Waterloo station, to the effect that the assessment committee for the parish of Lambeth had had laid before them a provisional list wherein the bookstalls were included for assessment.

4. These bookstalls had never before been included in any valuation or provisional list, nor had they been rated or assessed to the relief of the poor or otherwise, nor had the names of the appellants appeared in any valuation or provisional list, nor had the appellants been rated to the relief of the poor or otherwise in the parish.

5. On the 26th of February, 1880, the appellants gave notice to the assessment committee of their objections to the insertion of the bookstalls in the provisional list. On the 9th of March, 1880, the assessment committee overruled the objections. No copy of such provisional list, or notice thereof, was afterwards served on the appellants.

6. The rate or assessment for the relief of the poor and other purposes in respect of which the appeals were brought was made by the respondents and allowed on the 20th of March, 1880, and such rate purports to be made in accordance with the provisional list. [See a copy of the rate, so far as it relates to the bookstalls in question, opposite.]

7. The bookstalls in question are in possession of and used by the appellants under the terms of an indenture dated the 25th of April, 1872, and made between the London and South Western

No.	Name of occupier.	Description of property.	Number of house, and name or situation of property.	Gross estimated rental.	Rateable value.	Poor-rate made 20th March, 1880, at 1s. 3d. in the pound.	Poor-rate made 25th September, 1880, at 1s. 3d. in the pound.	Total of the vestry rates at 2s. 8d. in the pound, except on land wholly or partially exempt, and where partially exempt in the lighting and sewers rates one-third and one-fourth of such rates respectively.
				£	£	£ s. d.	£ s. d.	£ s. d.
3242	W. H. Smith, W. Lethbridge, and C. Awdry. Trading as W. H. Smith & Son.	Bookstall	5, Waterloo Station Platform.	71	60	3 15 0	3 15 0	8 0 0
3243	Ditto.	Bookstall	4, „ „	24	20	1 5 0	1 5 0	2 13 4
3244	Ditto.	Bookstall	5, Waterloo Station, Old Suburban Line Platform.	48	40	2 10 0	2 10 0	5 6 8
3245	Ditto.	Bookstall	5, Waterloo Station Platform, new line.	48	40	2 10 0	2 10 0	5 6 8

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

Railway Company (therein called "the company"), of the one part, and W. H. Smith and W. Lethbridge and their assigns (therein called "the tenants"), of the other part. A copy of the indenture, omitting the annual payments agreed to be made, was made a part of the case, and set out in an Appendix.

8. The terms of the indenture were in full force and effect at the date of the rate; and, in pursuance of the provisions in the indenture contained, the spaces occupied by the appellants' book cases were set apart, and, so far as the bookstalls are erected and placed upon the platforms of the station, they have been so erected and placed with the approval of the engineer and general manager of the company.

9. From the date of the indenture the appellants have exercised their rights thereunder, partly by attendants who have exhibited and vended newspapers, books, &c., carried by hand or carried by such assistants in baskets or other convenient articles to passengers at the stations or in the trains at the station, and partly by means of portable bookstalls or in the spaces so assigned as aforesaid. At the commencement of the grant under and by the indenture, and for some time afterwards, spaces for one moveable stall on the main line platform and for one moveable stall on the line then called the suburban line were assigned by the company to the appellants; but, as the station has from time to time been enlarged and the business and traffic thereat increased, other spaces have been assigned to the appellants. From time to time, at the request of the company, the appellants have closed their stalls and suspended the exercise of their rights and privileges.

[Paragraphs 10, 11, 12, and 13 described the bookstalls and the mode of placing them,—Nos. 3242, 3244, and 3245 being fixed to the platform and walls of the station, and No. 3243 merely resting by its own weight on the platform.]

14. The bookstalls are used exclusively by the appellants and their servants, and only for the purposes authorized by the indenture. They are closed at night with shutters, and locked up, and the keys are kept by the appellants' servants.

15. Alterations at the instance of the company have from time to time been made in the position of the bookstalls since the date of the indenture.

16. No rights of ingress and egress to and from the station or of access to the bookstalls are exercised by the appellants or their agents or servants, except under the provisions and for the purposes of the indenture.

17. In or about the year 1871, when the assessment of the London and South Western Railway Company to the poor rate in respect of their station at Waterloo was under consideration, the assessment surveyor to the parish of Lambeth included in his estimate for such assessment an item of 1000*l.* in respect of annual profit to the railway company arising from bookstalls and advertisement spaces. The company did not admit in their estimate such a source of profit, and appealed against the whole assessment; and upon the hearing of that appeal the assessment-sessions, without deciding as to any particular items, fixed a lump-sum as the rateable value of the station.

The questions for the opinion of the Court were,—1. Whether the appellants were liable to be rated in respect of the bookstalls, or any of them,—2. Whether the rate was a good and valid rate.

The Court were to be at liberty to draw inferences of fact: and judgments in conformity with the decision of the Court were to be entered in the appeals, with costs, at the session next or next but one after such decision should have been given. The costs of the special case to be in the discretion of the Court.

The indenture set out in the appendix was as follows:—

This indenture, made the 25th of April, 1872, between the London and South Western Railway Company (hereinafter called "the company"), for themselves, their successors, &c., of the one part, and W. H. Smith and W. Lethbridge, of No. 186, Strand, booksellers, &c., trading under the firm of W. H. Smith & Son (hereinafter called "the tenants"), for themselves, their heirs, &c., of the other part, Witnesseth that, in consideration of the yearly payments hereinafter reserved, and of the covenants and stipulations hereinafter contained and on the part of the tenants to be observed and performed, the company hereby give and grant to the tenants as is hereinafter restricted, for the term of seven years, to be computed from the 1st day of April, 1872, and thereafter from year to year (subject as hereinafter mentioned), the sole and exclusive licence and privilege (subject only to the reservations, covenants, provisoes, restrictions, and agreements hereinafter contained), to vend, sell, lend, and exhibit for sale and loan, newspapers, books, periodicals, pamphlets, prints, stationery, travelling caps, wrappers, and such other like articles required for the convenience of passengers by railway as shall be approved by the secretary of the company, at all the stations now existing and used or which shall hereafter during the continuance

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

of this grant be made or existing or in use for passengers on the several lines of railway belonging to or leased or worked by the company, &c., and at the expense of the tenants, to canvas for, place, post, &c., in proper frames advertisements, &c., upon such parts of the interior platform and station wall and fences of all the said stations, as may be approved of by the company, subject also to the reasonable regulations of the company with respect thereto, &c., not interfering with the space required for any notices, advertisements, &c., which the company may think proper to affix relating to or in connection with the business or traffic of their line of railway, or to the traffic or business of any other railway or steam-packet company or companies, as may from time to time be required by the general manager, &c.: Together with full liberty for the tenants, subject to the approval of the engineer of the company, to erect, place, and continue on such part of the platforms of the said several stations of the company as may be approved of by the general manager or engineer of the company, all necessary bookstands, cases, cupboards, and drawers, or other convenient places for exhibiting, keeping, and preserving their stock of papers, books, periodicals, pamphlets, &c., and to remove or alter the position from time to time if necessary; and also full and free ingress and egress at all reasonable times for the tenants, their servants or agents, to and from the several stations for the purposes of this present grant: And it is hereby expressly understood and agreed that the company shall not be in any way responsible for any stock or other property of the tenants which may be placed or left by them at the said several stations of the company pursuant to the licences and privileges hereby granted, and that each person employed by the tenants at the several stations of the company in the exercise of the licences and privileges hereby granted is during the time of such employment to be under the control and to abide by, obey, and perform all the lawful and reasonable orders and directions of the station-master at the station at which such person may be employed, and is to be liable in case of insobriety or misconduct to immediate removal from such station: And the tenants hereby covenant with the company, their successors and assigns, that, in consideration of the licence and privilege hereby granted by, and of the covenants herein contained on the part of, the company, they (the tenants) will pay to the company for each and every year of the term the rent or sum of £ —— by twelve equal monthly payments on the first day of each month in the year, in addition to the yearly rent or sum of £ ——, hereby reserved, pay or cause to be paid to the company quarterly, on, &c., in each and every year such a sum of money as shall be equal to a clear —— per cent. of the gross amounts from time to time received by the tenants from the public for placing, affixing, &c., all such advertisements, &c., at the several stations before referred to: And the tenants hereby undertake and agree to defray all expenses in connection with the canvassing for, placing, affixing, exhibiting, &c., of such advertisements, &c., as aforesaid out of the remaining —— per cent., being their share of the gross receipts after making such payments to the company as aforesaid; it being understood that the company's station-masters, porters, &c., shall so far as possible afford the tenants all reasonable assistance in the practical working of their advertising business: And the tenants further agree to render to the company accounts, &c., and to keep suitable books, &c., of all receipts, &c.: Provided always and it is hereby expressly agreed that, in case any monthly payment of the said yearly rent or sum of £——, or

any quarterly payment of such additional sum as is hereinbefore mentioned, shall be in arrear and unpaid for the space of fourteen days after notice in writing for payment thereof shall have been left at the principal place of business in London of the tenants, the same shall be recoverable by the company in addition to any other remedies, by distress as in the case of rent in arrear: And also that the tenants shall provide a sufficient supply of daily and other newspapers to all such passenger trains as the secretary or general manager of the company for the time being shall think fit, &c.: And also that the tenants will not vend or offer for sale any books, periodicals, &c., or exhibit or publish any advertisements, &c., of an indecent, immoral, or seditious character, or relating to medicines for complaints or ailments of an indecent or indelicate character, nor those of any competing railway, &c., company, nor those of workmen in combination, nor affix any advertisements, &c., which shall from time to time have been forbidden or prohibited by the company; and, further, that it shall be lawful for the company to remove from their premises any such books, &c.: And, further, that the tenants will not assign or demise the benefit of the grant, licence, or agreement hereby made, or any part thereof, to any person or persons whomsoever except to any person or persons who may become a partner or partners with the tenants, &c., without the written consent of the secretary or general manager: And, further, that the tenants will in the exercise of the licence and privilege hereby granted cause all such bookstalls, advertisements, announcements, handbills, and placards to be of neat and suitable appearance, &c., and shall abide by, obey, and observe the regulations which may be from time to time made by the company touching or concerning the placing on the platforms of the said several stations any of the necessary bookstands, cases, cupboards, and drawers; and that such bookstands, &c., shall be of neat and suitable elevation, &c., and shall be constructed in every way to the satisfaction of the engineer, &c. Covenant for a free pass, and for conveyance of parcels, &c., for the bonâ fide purpose of the trade, subject to such regulations as shall from time to time be made by the company or their general manager, &c., the company not being responsible for the loss of or any damage done to any such advertisements, &c.: And also that during the term the company will not permit any person to vend, lend, or exhibit any newspapers, books, &c. (other than their own train books and time-tables or the train books and time-tables of such other railway or steam-packet company or companies as aforesaid) at any of the stations of the company or over which they have the exclusive control, nor permit any person to exhibit or affix any advertisements, &c., in or upon any of the station walls, fences, &c. (other than any relating to the affairs or business of the company or of such other railway or steam-packet company as herein provided): And the company do hereby warrant unto the tenants the quiet and peaceable enjoyment and benefit of the grant, licence, powers, privileges, and benefits hereby granted for the period, upon the terms and stipulations, and in manner aforesaid, according to the true intent and meaning of these presents: Provided always and it is hereby agreed by and between the said parties hereto that, if any of the said monthly or quarterly payments of the said yearly rent or sum of £——, or of such additional sum as aforesaid respectively, or any part or parts thereof, shall be in arrear and unpaid for the space of eight days after the same shall have become due, or if the tenants shall wilfully break or neglect to fulfil or observe any of the covenants herein contained on their parts to be observed, it shall be lawful for the company to put

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

an end to the grant hereby made, by delivering to the tenants, or leaving at their usual or last-known principal place or places of abode or business in London, one calendar month's previous notice in writing (to expire on the last day of a month) of the intention of the company so to put an end to the said grant; and at the expiration of such notice the said term hereby granted shall cease and determine, but without prejudice to the rights of the company under the covenants and agreements herein contained up to such determination: And it is hereby further agreed, that, on the expiration of the said term of seven years, the licence and privilege hereby granted shall (unless the company or the tenant shall have given to the other of them in manner hereinafter specified three calendar months' previous notice in writing determining the same at the end of the said term of seven years) continue in full force and effect, and subject to the stipulations and conditions herein contained and provided, until either party shall give to the other of them, or leave at their usual or last known place of business or abode in London, three calendar months' previous notice in writing (to expire at any time of the year) of their desire to determine the same, and at the expiration of such notice the said licence and privilege shall cease and determine: The licence not to extend to any station not the sole property of or leased to or worked by the company, or over which they have not the entire control. In witness, &c.

Poland (with whom was *Archibald*), for the assessment-committee. The appellants are rateable in respect of these bookstalls. The indenture referred to in the case grants to them certain spaces on the company's platforms for a term of seven years. They build shops on these spaces: and the substance of the deed is to give them the exclusive enjoyment of those shops for the purpose of carrying on their trade therein.

[FIELD, J. You must shew that the company have done something more then grant to Smith & Son "exclusive enjoyment,"—that they have granted them exclusive occupation.]

They are at least as much in the exclusive possession and occupation of the spaces allotted to them, as were the occupiers of the chambers in *Reg.* v. *St. George's Union* (1), or of the surface buildings in *Kittow* v. *Liskeard Union* (2), or of the stables in *London and North Western Ry. Co.* v. *Buckmaster* (3), or of the moorings in *Cory* v. *Bristow.* (4)

[CAVE, J. Is there any case of exclusive occupation where the person occupying is debarred from the right to go in and out at all times?]

I am not aware of any. The occupation and enjoyment is quite

(1) Law Rep. 7 Q. B. 90.
(2) Law Rep. 10 Q. B. 7.
(3) Law Rep. 10 Q. B. 70, 444.
(4) Law Rep. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262.

independent of the company, so long as Smith & Son pay the stipulated rents, and conform to the conditions and regulations imposed upon them by the deed. The bookstand numbered 3243, which merely rests upon the platform by its own weight, possibly may stand upon a different footing from the others, which are fixed to the floor or walls of the station.

[The following cases were also referred to,—*Rex* v. *Churchill* (1); *Electric Telegraph Co.* v. *Salford* (*Overseers*) (2); *Reg.* v. *St. Mary Abbots* (3); *Reg.* v. *Smith* (4); *Reg.* v. *Morrish* (5); *Spear* v. *Bodmin Union* (6); *Allan* v. *Overseers of Liverpool.* (7)]

McIntyre, Q.C. (*Douglas Kingsford,* with him), was not called upon.

FIELD, J. I think we must answer the questions put to us by the sessions in the negative. The material question is whether the appellants are liable to be rated in respect of these bookstalls. Now, the principles upon which the rateability of occupiers under the Statute of Elizabeth rests are pretty clearly settled. Nothing else appearing, the London and South Western Railway Company are the persons rateable in respect of their station. They occupy a large portion of it, and they are rated in respect of it. They are practically paying rates for the spaces upon which Messrs. Smith & Son have erected these bookstands. It is now said that Messrs. Smith & Son are also rateable. Except in the case of a joint occupation, there cannot be two persons liable to be rated for the same thing. The onus of proving liability rests upon the respondents. The short facts are these:—The London and South Western Railway Company, being owners of the Waterloo station, have assigned certain spaces on their platforms to Messrs. Smith & Son for the purpose of erecting thereon bookstands for supplying passengers by the railway with newspapers, pamphlets, books, &c., and it is said that they have thereby parted with the exclusive occupation of those spaces to Smith & Son. Before the grant to Smith & Son, the company had the full ownership and occupation of the entire station. They had the power to allow anyone to

(1) 4 B. & C. 750.
(2) 11 Ex. 181.
(3) 12 Ad. & E. 824.
(4) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(5) 32 L. J. (M.C.) 245.
(6) 49 L. J. (M.C.) 69.
(7) Law Rep. 9 Q. B. 180.

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

Field, J.

come upon the premises. Mr. Poland must shew that they have parted with all their interest in this portion of their premises before he can make out that Smith & Son have such an exclusive occupation as to make them rateable. What they have done is in writing. The company have granted something. What was it? Was it exclusive occupation or exclusive enjoyment? Have they parted with the occupation? To determine this we must look at the whole scope of the agreement. What is a demise? It is where one person parts with all his interest in the subject of the demise to another. This is an interest in land, and requires to be in writing and under seal. From the beginning to the end of this document the parties carefully avoid all expression of intention to create a tenancy. It begins by expressing an intention to grant for a term "the sole and exclusive licence and privilege" (subject to certain reservations) to sell and lend, &c., newspapers, &c., at the company's stations: and it provides for the determination of the "licence or privilege" thereby granted: and, when they want to secure an easy mode of recovering the arrears of the monthly or quarterly payments, I find the parties carefully provide that the same shall be recoverable by the company, in addition to any other remedies, "by distress, as in the case of rent in arrear,"—a provision which would be unnecessary if they intended the instrument to operate as a demise. I come, therefore, to the conclusion that the parties did not intend the indenture to operate as a demise, but only as a licence or privilege. Here there is a general rateability in the company. Is there, then, a special rateability in another? The company keep in their own hands the whole control of the ingress and egress. What they have parted with is the sole and exclusive licence and privilege to sell books and papers, &c., at their several stations, with spaces for the erection of bookstands, and the use of the walls, &c., for exhibiting advertisements, &c. The bookstands are closed at night and locked, and the keys are kept by the servants of the appellants. The contents consisting for the most part of small articles, this was a necessary precaution for the security of the appellants' property, and is consistent with an exclusive enjoyment apart from "exclusive occupation." A lodger has exclusive enjoyment of the apartment let to him; but, if the landlord retains the

10 QBD 330

control and dominion of the whole structure, the tenant has not that exclusive occupation which is required to make him rateable. That was well settled in the Westminster Chambers case. (1) The reason of the decision there was, that the servant who held the key of the outer door, and had the general superintendence of the premises, was the servant of the several tenants though provided by the landlord. The deed here contains many very stringent provisions which shew the nature of the appellants' tenure. They are debarred access to the station during the night. The company may prevent the sale or exhibition of certain books and placards, and may remove from their premises persons in the employ of the appellants who are guilty of misconduct; and no articles can be exhibited for sale except those sanctioned by the secretary of the company. Looking, therefore, at the indenture only, in the absence of all authority, I should come to the conclusion that the company never intended to part with, and did not in fact part with the exclusive occupation of any portion of their premises to the appellants, so as to make the latter rateable. Several authorities have been referred to. Mr. Poland relied mainly on *Kittow* v. *Liskeard Union* (2) and *Cory* v. *Bristow*. (3) These two cases shew the principle of the argument for the assessment committee. If you find a man de facto in the enjoyment of a hereditament, having the exclusive enjoyment, you take him to be the occupier, and presumably owner of the fee. In the cases last referred to nothing more appeared. Kittow had a licence to dig for minerals, and to erect buildings on the surface of the land for the purpose of utilizing them. He had the exclusive occupation of the surface, and there was nothing to shew that there was any control exercised over him by the grantors, or any interference with his free right of ingress and egress. Cory in the second case was in the same position: he had the exclusive occupation of a portion of the soil of the river Thames under a grant made to him by the conservators pursuant to the powers conferred upon them by parliament. The coprolite cases,—*Roads* v. *Overseers of Trumpington* (4), and *Reg.* v. *Overseers of Whaddon* (5),—come

(1) *Reg.* v. *St. George's Union*, Law Rep. 7 Q. B. 90.

(2) Law Rep. 10 Q. B. 7.

(3) Law Rep. 10 C. B. 504; 1 C. P. D. 54; 2 App. Cas. 262.

(4) Law Rep. 6 Q. B. 56.

(5) Law Rep. 10 Q. B. 230.

1882

SMITH v. LAMBETH ASSESSMENT COMMITTEE.

Field, J.

within the same principle: the agreements disclosed a clear intention that the tenants should have the exclusive occupation of the land without any control on the part of the landlord. These cases are not sufficient to establish Mr. Poland's contention. They are met by a considerable body of authority the other way. Railway companies find it convenient, as well for the interest of the public as for their own profit, to utilize a portion of their premises through the agency of others. They cannot by themselves carry on the business of coal-merchants or newsvendors; for these purposes it is necessary that some sort of enjoyment should be given to others on the company's premises to enable them to do so. The case of *London and North Western Ry. Co.* v. *Buckmaster* (1) is a very strong one. There, the plaintiffs, a railway company, were the owners of stables within their curtilage. By their permission these stables were used by coal-owners under agreements by which they, in consideration of the company "permitting them to occupy and use a stable for —— horses," thereby agreed to pay a monthly rent of 1*l.* 5*s.*, and to observe and be bound by the bye-laws which should for the time being be issued by the company for the government of their railway stations, &c. The plaintiffs had not in fact exercised any control over or used any of the stables during the currency of the agreement; and none of the bye-laws had any application to the stables. The occupiers held the keys of the stables and the free right of ingress and egress at all times. And it was held that the company were rightly rated in respect of the stables. On appeal to the Exchequer Chamber, the judges were equally divided; three of them rest their opinion in some measure upon the reference to the bye-laws of the company as shewing an intention on the part of the plaintiffs not to part with their control over the stables. *Reg.* v. *Morrish* (2) is a very strong case. It rests upon the same principle as *London and North Western Ry. Co.* v. *Buckmaster*. (1) *Allan* v. *Overseers of Liverpool* (3) is a still stronger case in the same direction. Upon principle, therefore, and upon authority, I think it is quite clear that the company in this case did not part with the exclusive possession or occupation of any portion of their railway premises to Messrs. Smith & Son, but merely gave them such an exclusive

10 QBD 329

(1) Law Rep. 10 Q. B. 70, 444. (2) 32 L. J. (M.C.) 245.
(3) Law Rep. 9 Q. B. 180.

enjoyment of their bookstands and liberty to use the walls, &c., as was necessary to enable them to carry on their trade at the several stations: and consequently they are not rateable.

CAVE, J. I am of the same opinion. The question is whether the appellants are in the exclusive occupation of the spaces assigned for these bookstands, or whether the company are in the exclusive occupation of the whole station premises, subject only to a limited enjoyment of a portion by Smith & Son for the purpose of carrying on their trade there. The answer to that must depend upon the contract. Now, the object of the contract is to give Smith & Son the sole and exclusive licence and privilege to sell and exhibit for sale and loan newspapers, books, periodicals, &c., and such other like articles as shall be approved by the secretary, and to place advertisements, &c., on the walls of the several stations, subject to a reservation of space for the company's own time tables and advertisements; and, as a necessary part of such privilege, to place bookstands on the company's platforms. They are to have access to and from the stations, not at all times, but at all reasonable times; not for all persons, but for themselves, their servants, or agents; not for all purposes, but only for the purposes "of this present grant." They have no right to any particular access. They cannot do as they like with the premises. They have not a general right of occupation; but only a right to use the spaces allotted to them for the purpose of selling or lending books, periodicals, &c.; and even that right is subject to restrictions. The persons they employ are to be under the control of the station-master. They are thus controlled in their access, in the mode of enjoyment, and in respect of the persons employed by them at the several stations. How, then, can it be said that they are tenants having exclusive legal occupation of the premises? No case has certainly gone that length. I agree, therefore, that there must be judgment for the appellants, with costs.

Judgment for the appellants.

Solicitors for appellants: *Harvey, Oliver, & Capron.*
Solicitor for respondents: *G. W. Barnard.*

J. S.

1882
May 17.

[IN THE COURT OF APPEAL.]

HUNT *v.* AUSTIN.

Ex parte J. N. MASON.

*Practice—Summons—Substituted Service—Party to Action evading Service—Solicitor—Charging Order—*23 & 24 *Vict. c.* 127, *s.* 28.

A sum of money having been paid into Court for the benefit of the defendant, M., his solicitor, obtained a charging order for costs upon it under 23 & 24 Vict. c. 127, s. 28. The costs had been taxed ex parte. M. then took out a summons to shew cause why the sum of money paid into Court should not be paid out to him in part satisfaction of his taxed costs. This summons could not be served upon the defendant, who appeared to be wilfully evading service of it. L. had acted for the defendant after M. had ceased to do so, and H. had introduced the defendant to M.:—

Held, that substituted service of the summons should be allowed, that a notice calling upon the defendant to appear in one month should be put up at the master's office, and served upon L. and H., and advertised in the *Times* newspaper, and thereupon, if the defendant did not appear, an order might be made on the summons.

A SUM of 718*l.* 17*s.* 1*d.*, owing to the defendant by H. L. Bucknall, had been paid into court to abide the result of the action. J. N. Mason had acted as the defendant's solicitor down to and inclusive of the preparation of the briefs for the trial. F. Lamb was then instructed to conduct the action on behalf of the defendant. At the trial it was agreed that of the sum in court 600*l.* should be paid to the plaintiff, and 118*l.* 17*s.* 1*d.* should be paid to the defendant, and that each party should pay his own costs. The costs due from the defendant to J. N. Mason were taxed ex parte at 195*l.* 16*s.* 4*d.* J. N. Mason obtained a charging order under 23 & 24 Vict. c. 127, s. 28, upon the balance of the fund in court payable to the defendant. The defendant had been introduced to J. N. Mason by one Hogarth. J. N. Mason took out a summons calling on the defendant to attend upon an application that the sum of 118*l.* 17*s.* 1*d.* should be paid out to him in part satisfaction of his taxed costs. This summons could not be served as the defendant's address could not be discovered; he appeared to be wilfully evading service of it. The Queen's Bench Division held that there was no power to dispense

1882

HUNT v. AUSTIN.

with service of the summons, and refused an application for an order for payment out of Court to J. N. Mason. He appealed to this Court.

Brooke Little, in support of the appeal, prayed that service of the summons upon the defendant might be dispensed with.

BRETT, L.J. Upon these facts it must be taken that the sum of 118*l.* 17*s.* 1*d.* directed to be paid to the defendant out of Court, was obtained by the efforts of the solicitor, who makes the present application. An order has been obtained under 23 & 24 Vict. c. 127, s. 28, charging the amount in court which is payable to the defendant. It is desired that the fund may be paid out to the solicitor according to the practice followed in cases of this kind. An order to pay it out to the solicitor can be made only upon summons, and by the practice of the High Court that summons ought to be served. It is according to the first principles of justice that the defendant shall have notice of the application intended to be made against him; but it is probable that he has had actual notice, and no doubt he has anticipated the course which has been pursued: he seems to have purposely concealed his address and to be attempting to set at defiance the power of the Court; this he ought not to be permitted to do. A rule of practice ought not to be allowed to defeat a legal and proper claim: the Court can make an order which will prevent it from working any injustice. An order can be drawn up dispensing with a rule of practice, where the observance of it would be mischievous: and I think that the High Court ought to have made an order of that kind. We ought not to be hampered in this matter by any rule of practice which was not intended to apply to a case like this. The ground of the order which we intend to make, is that the person who is really liable is keeping out of sight in order to evade the service of the summons. We must hold that as the summons cannot be served personally, substituted service of it must be allowed. In this case we must declare that substituted service is equivalent to personal service. Our order is that a notice shall be put up in the master's office stating that the summons has been issued, and that if the defendant does not appear thereto on a day

1882

HUNT v. AUSTIN.

to be fixed after the interval of not less than a month, service will be dispensed with and an order will be made in his absence; that similar notices shall be served on Lamb and Hogarth, and that a similar notice shall be advertised once in the *Times* newspaper. Of course, if the defendant does not appear on the appointed day, an affidavit must be filed stating that the notice has been put up, served, and advertised in the manner which I have mentioned.

COTTON, L.J. The Court ought not to allow this charging order to become ineffectual, because the summons to enforce it cannot be served: an order for substituted service must be made, but a reasonable effort must be made to inform the defendant of the proceedings which have been taken. I think that the steps suggested by Brett, L.J., are sufficient to give the defendant notice of what has been done.

Appeal allowed. (1)

Applicant in person: *J. N. Mason.*

J. E. H.

May 29.

THE QUEEN (ON THE PROSECUTION OF THE PENARTH LOCAL BOARD OF HEALTH) *v.* THE LOCAL GOVERNMENT BOARD.

Local Government Acts — Streets — Paving — Expenses — Recovery of — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 252, 257, 268—*Appeal to Local Government Board—Prohibition.*

11 QBD 263
1883 5-7

Under 38 & 39 Vict. c. 55, s. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it, and on his default, the authority executed the work, and their surveyor gave him notice of apportionment of the expenses for which the owner was liable, and demand was made on him for the amount.

Under s. 268 he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the Local Government Board stating the grounds of his complaint.

On a rule for a prohibition to the Local Government Board:—

Held, that the notice to pave and the notice of apportionment were not, but the demand of payment was, within the terms of s. 268, a "decision" from which

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(1) The notice to the defendant of the summons was accordingly advertised in the *Times* newspaper of Friday, June 9, 1882.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

an appeal lay by memorial to the Local Government Board, and the owner having some right of appeal, although the memorial did not accurately state the ground of complaint, the Court would not, even if it could, prohibit the Local Government Board from entertaining the appeal.

Affirmed by C. of A. 10 QBD 309 C A

RULE calling on the Local Government Board and George Taylor to shew cause why a writ of prohibition should not issue directed to them to prohibit them from further proceeding in the matter of a certain appeal by George Taylor against a demand made upon him by the Penarth Local Board for payment of several sums amounting in the aggregate to 252*l.* 10*s.* 9*d.*, alleged to be due from him for private improvement works in respect of premises in Bradford Lane, and certain other streets within the parish of Penarth in the County of Glamorgan. (1)

(1) By 38 & 39 Vict. c. 55, s. 150, where a street is not paved, &c., to the satisfaction of the urban authority such authority may by notice addressed to the respective owners or occupiers of the premises fronting such parts as may require to be paved, &c., require them to pave, &c. "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned and referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

By s. 257, in all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

"Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same."

The local authority may, by order, declare any such expenses to be payable by annual instalments.

By s. 268, "where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties."

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

On the 4th of May, 1881, the Penarth Local Board served on George Taylor and others as the owners and occupiers of premises fronting, adjoining, or abutting upon a street called Bradford Lane, notice in writing under the Public Health Act, 1875, to level, pave, metal, flag, kerb, and channel the same within twenty-one days. A written notice of apportionment, dated the 19th of September, and signed by the surveyor of the board, was on the 21st of September, 1881, served on Taylor, which, after reciting the former notice and that, it not having been complied with by him, the urban sanitary authority had executed the works and that the expenses incurred amounted to the sum of 375*l.* 0*s.* 11*d.*, proceeded, "Wherefore take notice that I, the undersigned, being the surveyor of the said urban sanitary authority, in pursuance of the 150th section of the Public Health Act, 1875, do hereby apportion the sum of 75*l.* 11*s.* 3*d.*, as the proportion of the said sum of 375*l.* 0*s.* 11*d.*, to be paid by you as such owner as aforesaid, such apportionment being according to the frontage of your said premises, fronting, adjoining, or abutting upon the said lane. Further take notice that the aforesaid apportionment will be binding and conclusive upon you, unless within the expiration of three months from the day of the date of this notice you shall by written notice to the urban sanitary authority dispute the same."

Similar notices were given as to the other streets.

On the 20th of December, 1881, demands in writing were made on Taylor by the collector of the board in the following form signed by him: "I hereby demand payment of the sum of £ due from you to the Penarth Local Board for private improvement works in respect of premises in . . . . Lane, in accordance with the apportionment made by the surveyor of the said board, notice of which has been duly served upon you, and I am directed to inform you that unless the amount be paid before the expiration of fourteen days from the date thereof proceedings will be taken for the recovery of the same. I also demand interest on the said sum from the date hereof until payment at the rate of 5 per cent. per annum."

Within twenty-one days from the 20th of December, 1881, Taylor presented a memorial to the Local Government Board, laying before it certain circumstances by which he felt himself

aggrieved in connection with the demands for payment of sums amounting in the aggregate to 252*l.* 10*s.* 9*d.* He alleged, inter alia, that some of the work was unnecessary, and the total sum was extremely heavy, and said, "under the above circumstances I address this memorial to the Local Government Board so that I may learn whether the board consider that it is equitable that I should pay the heavy sums sought to be enforced against me which I submit for the foregoing reasons are excessive."

Sir Farrer Herschell, S.G., and *Channell*, for the Local Government Board, shewed cause. It is doubtful whether prohibition to the Local Government Board lies. But it is unnecessary to decide that question. The local board has no power of deciding judicially. By s. 268 a person aggrieved by the decision of the local authority may memorialise the Local Government Board, but the word "decision" means merely notice of the determination of the local authority to do some particular act. In the present case there were under the Act only three notices of any kind, viz., first, notice to do the paving; second, that the surveyor had apportioned Taylor's share of the expenses; third, a demand of payment. The last was the only one which can possibly be a "decision" within the meaning of the section. If there is an appeal at all, prohibition does not lie. There was an appeal from the decision, notice was given within twenty-one days and the Local Government Board have jurisdiction to entertain the appeal.

No notice was given to Taylor of the determination of the urban authority to do the work as they might do under s. 150. Under s. 257 the surveyor has power to apportion the moneys expended and the local authority may by order declare the expenses payable by instalments.

[NORTH, J. "Decision" seems to mean election between two courses, and the demand was an election to proceed summarily. See *Wilson* v. *Mayor of Bolton.* (1)]

There is an appeal not merely from the determination to recover in a summary manner, but from every determination to do any act by which a party is aggrieved. The appeal is from the "decision." The notice is merely to limit the time of appeal. If

(1) Law Rep. 7 Q. B. 105.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

it can be shewn that the aggrieved person had notice of any decision from which he appeals more than twenty-one days before the memorial the appeal is barred. But Taylor is not deprived of his appeal as twenty-one days had not elapsed since notice of a "decision." He can on the appeal dispute the total cost of the work. See per Blackburn, J.: *Cook* v. *Ipswich Local Board of Health.* (1)

Hannen, for Taylor. His interest and that of the Local Government Board are identical. He desires to appeal, and they to entertain his appeal. *Grece* v. *Hunt* (2), although on an earlier statute, shews the nature of notice of apportionment

Arthur Charles, Q.C., and *A. T. Lawrence,* in support of the rule. The appeal is out of time, and no part of the ground of complaint can now be entertained by the Local Government Board. The difficulty is that the local authority did not formulate their decision. The question turns on three sections of the Act. The first "decision" of the local board is that the street is not paved, &c., to their satisfaction, and that the owner shall do it. Then suppose the local board give notice to the owner to do the work. He will not do it. They do it for him and give him notice of the cost. Sect. 257 says that unless he disputes the apportionment within three months it shall be binding and conclusive. He does not dispute it within that time, yet it is contended by the other side that on appeal from the demand note he can dispute the original order to do the work. He cannot. The local board came to a series of "decisions," although perhaps the last of them —as to levying the amount summarily instead of by an improvement rate—is rather an "election." If, after a notice to do the work, he fails to do it he is an owner in default. The local board cannot be expected to do the work subject to the chance of his reopening the question as to the necessity for it. And, further, if he lets three months elapse he cannot appeal against the cost. He ought to have appealed within twenty-one days of the second notice. Since *Cook* v. *Ipswich Local Board* (1) it cannot be disputed that he can appeal against the total cost. But he should dispute the total cost first. The true meaning of the three sections is: that the owner must dispute the work within three months of notice

(1) Law Rep. 6 Q. B. 451. (2) 2 Q. B. D. 389.

of it, the cost within twenty-one days of notice of the amount. Here having done neither, and three months having elapsed, the apportionment is conclusive, and there is no appeal on any ground, consequently no jurisdiction in the Local Government Board, and the applicant is entitled to prohibition. Lastly, this is a case where prohibition lies. There is no authority exactly in point. The nearest is in *Breedon* v. *Gill.* (1) Prohibition will lie to a court of honour, court of the marshal, or any tribunal exercising judicial discretion: see Viner's Abrid. Tit. Prohibition. The Local Government Board entertaining the complaint is a court, and the memorial is the pleading therein.

As to the grounds of appeal, see *Mayor of London, &c.*, v. *Cox* (2), in which it was held that want of jurisdiction need not be pleaded, but may be shewn otherwise. There may be a right of appeal on the question whether the local authority should recover the expenses summarily or declare them to be private improvement expenses; but in his memorial Taylor did not complain that this was incorrectly treated as a matter to be dealt with summarily, whereas the payment ought to have been spread over years. [The *Tottenham Local Board* v. *Rowell* (3) was cited.]

GROVE, J. The rule nisi is general in its terms, and is to prohibit the Local Government Board and Taylor from proceeding in an appeal against a demand by the local board of a certain sum. It is clear that if we were to grant a prohibition in the terms of this rule, we should be prohibiting Taylor from appealing at all. I am of opinion that the rule should be discharged. In the first place, we should otherwise be granting an absolute prohibition against his proceeding in any way. It is admitted that he has a right of appeal under the 268th section. He has complied with the requirements of that section; he has within twenty-one days after receiving notice of some decision (I do not here say what decision, but will come to that point presently) addressed a memorial to the Local Government Board. It has been admitted that he has a right of appeal on the question whether the board could recover the amount of the apportionment

(1) 5 Mod. 269.

(2) Law Rep. 2 H. L. 239.

(3) 1 Ex. D. 514.

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Grove, J.

from him in a summary manner, or whether they should declare the expenses to be private improvement expenses, and as such a charge upon the land, the repayment of which would be spread over many years. We are asked to grant a prohibition because Taylor has not stated in his memorial to the Local Government Board that his ground of appeal is that the amount is not recoverable summarily. I am however of opinion that the memorial is not conclusive, and that if the appellant is within his proper time for appealing and has a right to appeal, he is not bound by the fact that he may not have stated correctly in the memorial the right ground of appeal. Nothing has been advanced in argument to shew that the tribunal of appeal might not allow him to amend a mistake in the memorial. The memorial is necessary as a means of fixing the time within which the appeal has been made; it is indeed a notice of appeal; but after that it is a mere matter of procedure, and is not conclusive upon the party memorialising. Were we to hold otherwise, we might deprive a man of his right to appeal unless his memorial were so skilfully drawn as to satisfy the critical mind of a pleader; that would be a hardship on a party having a good right of appeal. But, though I am of this opinion, it is unnecessary for me to decide that point, because I think that upon a fair interpretation of its language the memorial does include what is admitted to be a ground of appeal. The appellant seems in it not only to complain that the amount of expenses is excessive, but also that he is called upon to pay it at once when the payment might be by instalments, or as private improvement expenses spread over a number of years.

Secondly, upon the main point, as to the construction of ss. 268 and 257. Sect. 268, says, "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them or to declare such expenses to be private improvement expenses, he may within twenty-one days after notice of such decision, address a memorial to the Local Government Board." It is to be observed that there is in the procedure referred to, nothing which can be called a "decision" in the ordinary meaning of the word. There are a series of steps, but no decision. First, there is a notice to do the necessary

repairs; this may possibly be said to import a "decision" that he shall do the repairs; but it is difficult for us to say that it does, because the local authority may give him a notice to do certain repairs, and afterwards a notice that they require more or less repairs. Each of those communications would be a "decision," if the notice is to be so regarded. Then there is the notice of the apportionment, that is of the share of expenses to which the owner is liable. The third notice is a demand for payment of the apportionment, with the additional notification that in default of payment the board will proceed summarily under s. 216. This last notice is a notice of some decision; it is the first time that Taylor has notice that he is required to pay a certain sum. Within twenty-one days of receiving that notice Taylor appealed. It is argued that each of these steps is in itself a decision, and that he should appeal as to each, but more particularly against the apportionment, within twenty-one days of his receiving notice that each such step has been taken; and that Taylor cannot appeal either against the apportionment or against the total sum to which all the contributories are liable, because under s. 257 "Where such expenses have been settled and apportioned by the surveyor . . . . as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him . . . . of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same." The words "shall be binding," are said to apply not only to the relative share which an individual inhabitant has to pay, but also to the total amount of the expenses. I have some doubt as to the meaning of that clause; but, in my judgment that section is not applicable to the total expenses, but only to the apportionment. If the words "such apportionment shall be binding and conclusive on such owner," stood alone, there could be no doubt that "such apportionment" would mean the apportionment only. It is argued that the effect of the subsequent words as to "service of notice of the amount settled," is to make the apportionment binding upon the whole sum. But in my judgment this part of the section does not alter the previous part, it is only a proviso as to what the notice shall contain, viz., that it shall state—not merely that the person is to pay one-tenth

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

Grove, J.

of the total expenses, but—the sum of 200*l.*, or whatever it may be, being so much of the total sum. The notice of apportionment does not seem like a decision at all; there is no statement how it is arrived at, only the statement "we have incurred these expenses." What then is there to appeal from? Only that statement, and the only question on the appeal would be whether the board had incurred expenses to this amount. Then the notice goes on: "I ... do hereby apportion," that indeed may be a decision—it may be a notice at all events, that the surveyor has decided—that he apportioned the particular sum to the particular person, but it does not affect the question whether the total expenses incurred are proper or not. It is a notice of apportionment, and in that sense may be, and I am inclined to think is, a decision of the apportionment.

In *Hesketh* v. *Atherton Local Board* (1), the owner disputed his liability, alleging that the highway was repairable by the inhabitants at large; but Blackburn, J., says in his judgment, that s. 63 (which is the section of the old Act corresponding to s. 257 of the new), "is confined to the apportionment, and it is that and that alone, that is made conclusive and binding." Quain, J., goes further, and says: "All that is made binding on the owners is the apportionment according to their frontage." Archibald, J., says, "The language of the section is quite clear: it is the apportionment only that is made conclusive and binding on the owners, assuming the liability to exist." The case is a strong authority to shew that the learned judges construe that section as I do the section before me, which corresponds with it. There are many parts of the Act which make it very improbable that s. 257 could be intended to apply to the total expenses; and there is no decision of the board as to the total expenses.

In *Greece* v. *Hunt* (2) it was held that it was necessary, before summary proceedings can be taken for the recovery of the amount apportioned, that a demand of payment of the amount apportioned should be served, and that the six months within which the proceedings must be taken under 11 & 12 Vict. c. 63, are to be reckoned from such notice of demand. In the present case no notice of demand to pay the money was served until within twenty-

(1) Law Rep. 9 Q. B. 4, 7. (2) 2 Q. B. D. 389.

one days of the presentation of the memorial; the other notices are not notices of a decision within the meaning of the sections of the Act relating to appeal.

I am of opinion therefore upon two grounds that we cannot prohibit the Local Government Board; first, that Taylor is undoubtedly entitled to some appeal, though the memorial does not state the exact ground; and, secondly, upon the construction of the section of the Act. I am not sorry to be able to come to this conclusion, for the tribunal which we are asked to prohibit has wide powers to look equitably into the matter. As to whether a writ of prohibition will lie to the Local Government Board I give no opinion; but I think it a doubtful question.

NORTH, J. One of the points raised in this case seems important, viz., the construction of the Public Health Act. The 150th section provides that where any street not being a highway is not levelled, paved, &c., to the satisfaction of the urban authority, such authority may, by notice to the owners and occupiers of premises fronting, adjoining, or abutting, require them to level, pave, &c., within a time to be specified in the notice, and if the notice is not complied with the urban authority may themselves execute the works and recover the expense in a summary manner. In this case what decision can the local board be said to have arrived at? There are four steps in the proceedings; the first being when the notice was given requiring Taylor to do the work; is that a decision? It can only be a decision that the street is not paved to the satisfaction of the board, and against such a decision no appeal could lie. The statement that the premises abut on the part requiring to be paved is a mere statement of fact. Then there is a notice to Taylor to do the work in twenty-one days, but there is nothing in that notice indicating any decision by the Board that they would do the work if the owner did not. This is not a notice of a decision, for the owner cannot be forced to do the work; the alternative is that the board may do it themselves. The next step was that the board did the work under s. 150. That section gives the surveyor no power to do anything except to settle the proportion in which the owners are to pay. And that is all that he has done in the notice given. As I read it,

1882

THE QUEEN v. LOCAL GOVERNMENT BOARD.

North, J.

there is in this notice only a decision as to one point, viz., the proportion payable by Taylor. Then what was the effect of this decision under s. 257? The exact words of the section seem to show that the surveyor has simply to settle the apportionment of the amount and nothing else than that which he has to settle is dealt with by the section. But it is said that besides the patent notice of Taylor's proportion there is a latent notice that the board have decided that the total expense is 375*l*. But, first, I do not find in the notice delivered any notice of any such decision as to the total amount; secondly, I do not think the surveyor has any power to give notice of such decision. It is to be given by the board. Further, in this particular case notice is to be given by the surveyor of the apportionment, and an express time for appeal is given, viz., three months. There may be a reference to arbitration under s. 150 upon any complaint within three months. If it were intended that the notice given to him was to operate in a double way, first, to be binding unless notice that he disputes it were given within three months, and also to be binding in another respect unless notice were given within three weeks to a different tribunal, I do not think this section would have dealt with both those matters, but, inasmuch as I find it deals simply with an appeal by way of arbitration in case the surveyor has settled the amount wrongly, I do not think that section contemplates in any way the notice being given under it which is to have the effect of marking the commencement of the three weeks necessary for an appeal under a totally different section. Further the terms of the final clause of the notice itself are significant. They show that the intention of the parties who gave it was to have the effect of making the time for dispute run which was given under s. 257 for three months, and not to affect the time of the three weeks' appeal given by s. 268. We now come to the 268th section which prescribes that an appeal must be made to the Local Government Board within three weeks. For the purpose of starting this period of three weeks a notice was given in December; and it is admitted that Taylor's memorial was properly presented within the time prescribed by that section.

I think that s. 257 does not apply to this case at all, but that s. 268 does, and that Taylor had three weeks from the time of the

notice in December within which to memorialize the Local Government Board. Neither the notice to do the work, nor the notice of the surveyor's apportionment seems to me to be such a notice as to come within the provisions of s. 268. But, assuming that I am wrong in this, and that those notices were within the provisions, then the question arises whether there is now any right of appeal or not. I think there is, because the memorialist has a right, where such a notice is given as was given here, to complain of being aggrieved by a decision that the 252*l.* is to be paid by him or recovered from him in a summary manner. It is said that his memorial does not raise that case. I think however that, even if construed strictly, it suggests and asks relief on the ground that the sum which he is required to pay at once is, because a demand for immediate payment is made, excessive in amount.

If there is appeal by a memorial on which he can clearly get some relief, should he make out a case for it, I think it impossible that we should grant a prohibition restraining that appeal altogether. As to the third point, viz., whether a prohibition lies to the Local Government Board, I have formed no opinion.

Rule discharged with costs.

Solicitors for Local Board: *Torr & Co.*

Solicitors for Local Government Board: *Sharpe, Parkers, & Pritchard.*

Solicitors for Taylor: *Ingledew & Ince.*

J. R.

1882
March 28.

SAUNDERS, APPELLANT; CRAWFORD, RESPONDENT.

Elementary Education—39 & 40 *Vict. c.* 79, *ss.* 8, 11, *subs.* 1; 41 *Vict. c.* 16, *Sched.*—*Attendance Order*—"*Full Time Employment.*"

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By 39 & 40 Vict. c. 79, s. 11, subs. 1, if the parent of any child above the age of five years "who is under this Act prohibited from being taken into full time employment," habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, a court of summary jurisdiction may order that the child do attend school:—

Held, that subs. 1 refers to s. 8, which applies certain sections of the Factory Acts to the employment and education of children, and that, as those sections have been repealed by 41 Vict. c. 16, Sched., there can be no child within the terms of 39 & 40 Vict. c. 79, s. 11, subs. 1, "who is under this Act prohibited from being taken into full time employment," and therefore subs. 1 has ceased to operate.

CASE stated by a metropolitan police magistrate under 21 & 22 Vict. c. 43.

The appellant obtained a summons in his capacity of an officer of the School Board for London against the respondent under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79, s. 11, subs. 1), charging that the respondent "on the 28th of September, 1881, and on other days, being the parent of a certain child named Albert Crawford, which child is above the age of five years, to wit, of the age of thirteen years or thereabouts, and is by the Elementary Education Act, 1876, prohibited from being taken into full time employment, had notwithstanding due warning already given him by the School Board for London, unlawfully, habitually, and without reasonable excuse neglected to provide efficient elementary instruction for his said child contrary to the provisions of the Elementary Education Act, 1876, in such case made and provided."

The summons was heard before the magistrate, and the appellant asked him to make an order requiring the attendance of the respondent's child at some certified efficient school. The magistrate refused the application and declined to make such attendance order on the ground that the child was over thirteen years of age. Sections of the Acts were set out in the case and the question proposed was whether under ss. 11 and 48 of the Act of 1876 the school board can compel all children under fourteen to attend school.

1882

SAUNDERS v. CRAWFORD.

The Court said the question should not be so general as that put by the magistrate, but was whether his decision was right.

Faber, for the appellant. The question is whether a child above the age of thirteen and under the age of fourteen can be compelled to attend school. The child here is within the definition clause of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 48, being "between the ages of five and fourteen years," and by s. 11 an attendance order may be made on the parent.

Danckwerts, for the respondent. No, for the child is not "under this Act prohibited from being taken into full time employment": s. 11. The prohibition is to be sought for in the Factory Acts referred to in s. 8.

[*Faber* pointed out that those Acts were repealed by 41 Vict. c. 16, Sixth Sched.]

Then there is no child prohibited from being taken into full time employment, and no order can be made under s. 11 in respect of subs. 1. The education of respectable children up to the age of thirteen years is sufficiently provided for by the Act of 1870 (33 & 34 Vict. c. 75), and the education of children within subs. 2 of s. 11 "found habitually wandering, or not under proper control, or in the company of rogues, vagabonds, disorderly persons, or reputed criminals," may until the age of fourteen be enforced by an order on the parents under the Act of 1876.

Faber, in reply. The point raised was not taken below. If the words in s. 11, subs. 1, "under this Act prohibited from being taken into full time employment" are impliedly repealed by the express repeal of s. 8, the subs. 1 can be read without them and applies.

GROVE, J. Our decision will fortunately only affect a limited class of children, viz., those between the ages of thirteen and fourteen years.

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74, a school board may make bye-laws, "requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend

1882

SAUNDERS v. CRAWFORD.

school." If this child were under the age of thirteen the magistrate might no doubt, under proper bye-laws, which I will assume to exist, compel the parent to send the child to school. But the child being over the age of thirteen did not come within the Act of 1870 and the bye-laws made under it, so the magistrate was asked to order attendance under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11. There was before this Act a provision as to children up to the age of thirteen years, but children under fourteen could under the Factory Acts be taken into, what I will call, half-time employment, leaving them a good deal of idle time during which they ought to have instruction, and the Act of 1876, s. 11, subs. 1, enacts that if the parent of any child above the age of five years "who is under this Act prohibited from being taken into full time employment, habitually and without reasonable excuse, neglects to provide efficient elementary instruction for his child," an attendance order may be made. If the Factory Acts had remained intact, and s. 11, subs. 1 of the Act of 1876 had remained intact, this child would have been within it, and the magistrate ought to have made an order. But it is now admitted and clear under 41 Vict. c. 16, that these Factory Acts, so far as they are incorporated in the Education Act of 1876, by s. 8, are repealed. Subs. 1 of s. 11 has gone with them. No great harm is done thereby, for subs. 2 remains, and is applicable to any child "found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons, or reputed criminals." So that all that is affected by the repeal of the Factory Acts in question is the provision as to children having spare time through not having full time employment, and the parent cannot be punished for not educating them between the ages of thirteen and fourteen years. Probably that was overlooked when the Acts were repealed. It seems to me that the part of s. 8 founded on Acts now repealed being gone, subs. 1 is also gone, so the decision of the magistrate was right.

HUDDLESTON, B. It is extremely difficult to interpret this Act, but from what I have heard in argument, s. 11 of the Act of 1876 seems only needed for children between thirteen and fourteen, as there is a provision for children under thirteen

in the Act of 1870. There are two classes: The respectable child and the vagabond child, and the legislature says, As to the respectable child the order is to be made on the parent, who without reasonable excuse neglects to provide elementary instruction for that child, viz., a child above five years old, and prohibited from being taken under this Act into full time employment. We find no section in this Act prohibiting the child from being taken into full time employment, but s. 8 refers to statutes containing such prohibition. Those statutes have been repealed, and, being repealed, the legislature has thought it unnecessary to prohibit children from being taken into full time employment. Therefore it is not necessary to deal with the respectable child under fourteen, who may be taken into full time. Then with regard to the vagabond child, the liability arises not on the habitual or inexcusable neglect of the parent to provide elementary instruction, but when "any child is found habitually wandering, or not under proper control, or in the company of rogues, vagabonds, disorderly persons, or reputed criminals" within the terms of sub-sect. 2, an order may be made that the child do attend some school. By the Interpretation Clause, s. 48, "A child in this Act means a child between the ages of five and fourteen years." There is no case in which the respectable child can be prohibited from being taken into full time employment, so that such child under fourteen is not a person for whom an attendance order under s. 11 can be made on the parent. The result is merely this: that a child must be compulsorily sent to school while under thirteen, but if the child be a vagrant, or out of control, or in bad company, he may be dealt with until he is fourteen. The construction of the statute is very difficult by reason of the practice now adopted of framing Acts of Parliament with sub-sections and schedules, and references to other Acts, so that much research is needed in order to ascertain whether a particular section may or may not be repealed.

Appeal dismissed with costs.

Solicitors for appellants: *Gedge, Kirby, Millett, & Morse.*
Solicitor for respondent: *Solicitor to the Treasury.*

J. R.

1882
June 19.

[IN THE COURT OF APPEAL.]

CATO *v.* THOMPSON.

Vendor and Purchaser—Purchaser's Knowledge of Defect of Title—Right to rescind.

T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—

Held, affirming the decision of Lopes, J., that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover.

Farebrother v. *Gibson* (1 De G. & J. 602) and *Leyland* v. *Illingworth* (2 De G. F. & J. 248) distinguished.

ACTION by a purchaser of freehold houses to recover his deposit on the ground that the vendor had failed to make out a title.

The contract which was contained in letters was to make a good marketable title to the property to be approved by the plaintiff's solicitor.

On investigation of the title it appeared that the land on which the houses were built had formerly belonged to a building society and had been sold along with other land by them in lots subject to divers restrictive covenants, among which were stipulations that no house, or part of a house, of less value than 400*l.* should be erected on any lot, and that no building should be erected as a shop, workshop, warehouse, or factory, nor should any trade, business, or manufacture be carried on, nor any operative machinery be fixed or placed upon any lot, except a lot which did not form part of the said property to which this action related.

The purchaser's solicitor, on discovering these restrictive covenants, required that they should be released, and, the vendor not complying with this requisition, the title was rejected and this action commenced.

At the trial before Lopes, J., the defendant adduced evidence to shew that the plaintiff knew of the restrictive covenants when the contract was entered into. The jury found that he did know

of them. Lopes, J., however directed judgment to be entered up for the plaintiff, expressing an opinion that he had been wrong in admitting the evidence. The defendant appealed.

Renshaw, for the defendant, but the Court called on,

W. Pearson, *Q.C.*, and *McSwinney*, for the plaintiff. The defendant in terms agreed to make a good title, and he must make it, or else the plaintiff has a right to be off his bargain. A title subject to these restrictive covenants is manifestly not a good marketable title. The case is not like that of property being subject to a liability which can by no possibility be got rid of. In such a case a purchaser who buys with knowledge must be supposed to have intended to buy subject to the liability, but the restrictive covenants might be released. There would be ground for this contention if this had been simply an open contract with no reference to the title, but the express stipulation makes this case much stronger. The purchaser in fact says: "I know your title is defective, but I will buy if you make a marketable title by getting rid of the covenants."

Renshaw, in reply. The plaintiff had notice of the restrictive covenants and so cannot complain.

[JESSEL, M.R.:—If a purchaser has notice of incumbrances still the vendor must pay them off. The title is not a good title if subject to these covenants: *Phillips* v. *Caldcleugh*. (1) The express stipulation to make a good title only provides for what would without it be implied, but it strengthens the plaintiff's case by shewing that the parties knew the law.]

In *Farebrother* v. *Gibson* (2) a purchaser who had notice of a defect was held to be debarred from complaining of it. The case shews that a purchaser is bound by information though it varied the written contract. If a purchaser knows of a defect he cannot complain of it: *Bowles* v. *Round*. (3)

[JESSEL, M.R.:—In some cases that is so; but I do not assent to it as a general proposition.]

Leyland v. *Illingworth* (4) supports it.

JESSEL, M.R. This is an appeal from a decision of Lopes, J., that the plaintiff, a purchaser, was entitled to recover his deposit

(1) Law Rep. 4 Q. B. 159.
(2) 1 De G. & J. 602.
(3) 5 Ves. 508.
(4) 2 D. F. & J. 248.

1882

CATO v. THOMPSON.

on account of the failure of the vendor to shew a marketable title. When we read the contract it is impossible to doubt what it means, or to doubt that the vendor has failed to fulfil it.

The contract is for the sale of freehold houses, and the vendor expressly agrees to make a good marketable title to them. When the title came to be investigated, it was found that the conveyance to the vendor contained various restrictive covenants on his part, notably one which prevented the houses from being turned into shops or used otherwise than as private dwelling-houses. This is often called an incumbrance, but not with propriety; such covenants do not run with the land, but are enforceable in equity against any one who buys with notice of them, and it is clear that such restrictions prevent the title from being a marketable title.

The jury in this case found as a fact that the purchaser when he signed the contract knew of the existence of these restrictive covenants, and considering that they were entered into with a building society he must be taken to have been aware of the extreme improbability and almost impossibility of obtaining a release of them. Still the terms of the agreement are plain—that the vendor will make a good marketable title. Lopes, J., held that the fact that the purchaser had notice of the covenants made no difference. It was argued before us that the purchaser in such a case must complete with compensation, if he did not know of the defect, and without compensation if he did know of it.

Now, in the first place, this is not a case for enforcing specific performance on a purchaser with compensation. It is almost impossible to assess compensation for covenants of this nature. I think that the cases of specific performance with compensation ought not to be extended. In many of them a bargain substantially different from that which the parties entered into has been substituted for it and enforced, which is not right. I think this not a case for compensation.

Cases however have been cited which are said to shew that the Court will enforce a contract in spite of a defect of title where the purchaser knew of the defect. I think that the cases stop short of the present by an important step, and that the principle which underlies them, though I do not say that it is clearly expressed in them, is not applicable to this case.

In *Farebrother* v. *Gibson* (1), property was stated to be in the occupation of a company under a lease. It was in the occupation of that company and under a lease, but the lease was not one granted to the company. Now, where particulars contain a statement which is literally true, but which is susceptible of another meaning, and such other meaning is more likely to be taken than the true one by a person reading the particulars, the purchaser if he knows nothing of the real facts, and understands the particulars in the other sense, is entitled to say that the vendor has deceived him; but if he knew the facts he has nothing to complain of. The purchaser in *Farebrother* v. *Gibson* (1) not knowing the facts, bought in the belief that the company held the property under a lease granted to them, which was the most natural reading of the particulars. The particulars did not say so, but the purchaser had a right to assume it; and it being a material point to him whether the company were the original lessees, he, not knowing the fact when he signed the contract, had a right to complain. No actual misstatement, however, had been made, and if he had known the real state of the case he would have had no ground of complaint.

In *Leyland* v. *Illingworth* (2) the representation in the particulars was that the premises were well supplied with water. They were well supplied with water, but only by a waterworks company. A purchaser who did not know the fact would have a right to say, "When you told me that the property was well supplied with water, of course I understood you to mean that I should have an abundant supply of water without paying for it." There was, however, no direct misstatement in the particulars and a purchaser who knew the real state of the case would have nothing to complain of. This has no application to a case where a party wishes to contradict the express terms of the contract.

The third case was one where a man bought a freehold knowing that there was a right of way over it which could not be released. In that case there was no express contract as to a marketable title, there was only a presumption arising from the fact of sale, which was rebutted by actual knowledge. Such a case stands on a different footing from one in which the vendor has expressly contracted to shew a marketable title.

(1) 1 De G. & J. 602. (2) 2 D. F. & J. 248.

1882

CATO v. THOMPSON.

It has been urged that every contract must be considered to contain a tacit exception of incumbrances of which the purchaser knows. But this is not the case. A purchaser often buys knowing that the property is incumbered up to the hilt, but he does not take a conveyance subject to the incumbrances. Here it was known that it was improbable that the restrictive covenant could be got rid of, yet there is an express contract to make a marketable title. It comes to this, "I know that there is a serious defect in your title, but I will buy if you can make it marketable." The appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The action is by a purchaser against his vendor to recover the deposit on the ground that the title is not marketable. The seller defends the action, and claims specific performance. Evidence was admitted at the trial to shew that the defendant, when the contract was entered into, knew that the property was subject to the restrictive covenants which form the objection to the title, and the jury found that he did know of them. Lopes, J., decided in favour of the plaintiff, and seems to have thought that he ought not to have admitted evidence as to the plaintiff's knowledge of the covenants.

The contract expressly stipulates that the vendor shall make a good marketable title. Now it is beyond all question that, owing to the existence of the restrictive covenants, the title is not marketable. Why then cannot the purchaser throw it up? The reason given is that he knew of the covenants when he entered into the contract. Lopes, J., said that this would be contradicting a written contract by parol evidence, and that the evidence was inadmissible. In this, I think that he was right. Parol evidence is admissible where you have a case of specific performance with compensation, but an express bargain to make a good title cannot be modified by parol evidence. Such evidence would be admissible in an action to reform the contract, but is not admissible for the purpose of construing it.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff; *Alfred H. Crowther.*
Solicitor for defendant: *W. Easton.*

H. C. J.

[IN THE COURT OF APPEAL.]

1882
June 21.

SHUBROOK *v.* TUFNELL.

Practice—Case stated by Arbitrator—Appeal—Interlocutory or Final Order.

An arbitrator, under an order of reference, stated a case for the opinion of the Court, which provided that, if the opinion of the Court should be one way the case was to be referred back to the arbitrator; if the other way judgment was to be entered for the defendant with costs. A divisional court decided in favour of the plaintiffs, and referred the case back to the arbitrator. The defendant appealed:—

Held, first, that an appeal could be brought from the order; secondly, that it was a final order, and that the appeal must be entered in the general and not in the interlocutory list.

Collins v. *Vestry of Paddington* (5 Q. B. D. 368) distinguished.

ACTION by the lessee of two houses against the lessor to recover damages for structural damage caused to them by the defendant's making a drain through adjoining land. By order in Chambers the action was referred to arbitration, the arbitrator at the request of either party to state a case for the opinion of the Court at any time before giving his final award. The plaintiff having died the action was continued by his executors.

The arbitrator stated a case which set out the material facts, and concluded:—

"The question for the opinion of the Court is whether upon the facts above stated, and assuming the damage to be in fact attributable to the drain works, there is any cause of action either by reason of an infringement of a legal right of support in the plaintiffs, or, if there be in law no such right of support, by a negligent and unskilful construction of the drain by the defendant. If the Court shall be of opinion in the affirmative then the case is to be referred back to the arbitrator. If the Court shall be of opinion in the negative, then judgment shall be entered up for the defendant with his costs of suit."

May 23. The case was argued before Manisty and Williams, JJ., who ordered "That judgment on the case be entered for the plaintiffs, the Court being of opinion that upon the facts stated, and assuming the damage to be, in fact, attributable to the drain works,

1882

SHUBROOK v. TUFNELL.

there was a cause of action, and they further ordered that the case be referred back to the arbitrator."

On the 2nd of June, 1882, the defendant gave notice of appeal for the 7th, and set the case down in the interlocutory list.

June 21. *Sills*, for the plaintiffs. First, no appeal will lie from an order like the present. Sect. 19 of the Judicature Act, 1873, only gives a right of appeal "from any judgment or order." Here there is no judgment or order, but only an expression of the opinion of the Court. In *Jones* v. *Victoria Graving Dock Co.* (1), Lord Coleridge, C.J., said, that apart from the special agreement in that case an appeal would not lie, on the ground that such a giving an opinion is not a judgment or order.

[JESSEL, M.R. Both Bramwell and Brett, L.JJ., seem to have differed from his lordship on that point.]

The decision in *Reg.* v. *Overseers of Walsall* (2) is to the same effect, and the reversal in the House of Lords (3) proceeds on grounds which do not apply here, for there was in that case an order discharging a rule.

H. Matthews, Q.C., and *Fellowes*, for the defendant, were not heard.

JESSEL, M.R. I am clearly of opinion that an appeal lies.

LINDLEY, L.J., concurred.

THE COURT then took the objection that this was an appeal from a final order, and ought not to have been set down in the interlocutory list.

H. Matthews, Q.C., and *Fellowes*, for the defendant, referred to *Collins* v. *Vestry of Paddington.* (4)

JESSEL, M.R. That case is distinguishable from the present, for there the arbitrator only submitted one point to the Court, there being other matters in the action, so that in whatever way the Court decided that point the case went back to the arbitrator.

(1) 2 Q. B. D. 314, 327.
(2) 3 Q. B. D. 457.
(3) 4 App. Cas. 30.
(4) 5 Q. B. D. 368.

1882

SHUBROOK v. TUFNELL.

The first clause of the headnote is too wide, the Court did not decide the general proposition there laid down, but only held that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory. Here if we differ from the Court below, final judgment has to be entered for the defendant, and there is an end of the action. I am of opinion that this is to be treated as a final order, and the appeal must take its place in the general list.

LINDLEY, L.J., concurred.

Solicitor for plaintiffs: *Frederick Taylor.*
Solicitor for defendant: *E. Carleton Holmes.*

H. C. J.

[IN THE COURT OF APPEAL.]

June 16.

DAVISON *v.* DONALDSON.

Principal and Agent—Discharge of Principal by mode of dealing with Agent—Delay—Ship's Husband.

In order to discharge a principal from his liability for a debt contracted by his agent the principal must shew that the creditor has himself misled him into supposing that he has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition. Mere delay in enforcing payment from the agent will not be sufficient for the purpose.

The plaintiff sold stores for a ship to T., who was ship's husband and managing owner. The defendant was part owner of the ship, and was also interested jointly with T. in the adventure for which the ship was being fitted out. The plaintiff applied to T. for payment, but did not obtain it. Three months after the goods were supplied, and again two years after that, the defendant settled accounts with T. and gave him credit for the price of the goods, supposing that they had been paid for. More than three years after the goods had been supplied, T. having become bankrupt, the plaintiff for the first time applied for payment to the defendant and brought his action for the debt:—

Held, that there had been no such conduct on the part of the plaintiff as would discharge the defendant from his liability.

Irvine v. *Watson* (5 Q. B. D. 102), *Heald* v. *Kenworthy* (10 Ex. 745), and *Smethurst* v. *Mitchell* (28 L. J. (Q. B.) 241) considered.

APPEAL from a judgment of Mathew, J. The case was tried at the Newcastle assizes in January, 1882, when it appeared that

1882

DAVISON v. DONALDSON.

the action was brought by T. Davison, in his own right, and as executor of W. Davison, against J. J. Donaldson, one of the co-owners of the ships *Eliza Mary* and *Lucy Jane*, for beef and other goods supplied between April and September, 1877, for the use of the ships. The principal defence was as follows:—That the goods were supplied to C. Tate, who was the managing owner and ship's husband of the ship, and on his order and credit; that W. Davison and the plaintiff knew that he was her managing owner and elected to treat him as principal; that they never made any application to the defendant or the other co-owners for payment of the charges claimed till February, 1881, or gave any of them notice that the said charges had not been paid; that W. Davison and the plaintiff knew the defendant and the other co-owners would from time to time in the ordinary way of business settle the accounts of the ships with Tate, and would include in such accounts the sums now claimed; and that in fact the defendant and other co-owners, before they had notice that the charges had not been paid, did settle with Tate as such managing owner accounts in which they paid or allowed him the moneys now sued for as moneys paid by him; and that they were induced to pay or allow him such sums by the conduct of W. Davison and the plaintiff, and on the belief induced by such conduct that Tate had paid the money now sued for, and that W. Davison and the plaintiff had supplied the goods on the sole credit of Tate, and had elected to treat him as the principal in the transaction.

The following facts were proved or admitted by the parties. The goods were supplied to the order of C. Tate while acting as ship's husband, and the invoices were made out to "C. Tate and the ship *Eliza Mary*," or to "C. Tate and the ship *Lady Jane*."

The defendant was not only co-owner with Tate of the ships, but was also interested jointly with him in the voyages for which the provisions were supplied.

The plaintiff and W. Davison repeatedly applied to C. Tate and his son, G. A. Tate, who was in partnership with him, for payment, but were unable to obtain it. C. Tate died in October, 1878. In January, 1881, G. A. Tate became a liquidating debtor.

In December, 1877, an account was settled between C. Tate and the other co-owners in which credit was allowed to Tate for the

payment of these wrong charges; and a further account was settled between his estate and the other co-owners in December, 1879, in which the balance of the former account was brought forward; but in neither of these settlements were vouchers produced for the payment of these charges.

The learned judge having given judgment for the defendant, the plaintiff appealed.

Hopwood, Q.C., and *McClymont*, for the plaintiff. The defendant was not only co-owner of the ships, but also co-partner with Tate in the adventures in which the ships were employed. The case comes within the ordinary rules that all the partners are liable for a debt incurred in the partnership business. The fact that Tate was ship's husband makes no difference. Whatever the form of the invoices may be, all persons dealing with a ship's husband know that he is acting on behalf of the co-owners and they do not give credit to him personally, but to the owners of the ship. There has been no delay on the part of the plaintiff which has had the effect of altering the position of the defendant or deceiving him. If he supposed that the beef was paid for by Tate, it was his own fault for not calling for vouchers of his accounts.

Cohen, Q.C., and *Edge*, for the defendant. There were special circumstances in this case which discharged the defendant from his ordinary liability as a co-partner. The plaintiff did not deal with Tate as a member of a partnership, but as ship's husband. A ship's husband is no doubt the agent of the owners, but he is in a peculiar position, it is not the course of business that he should buy on credit: his duty is to pay debts as they become due. The owners of the ship had a right to suppose that he had done so in the present case. Consequently the long credit which the plaintiff gave to Tate deceived the defendant, and led him to settle accounts with Tate in 1877, on the supposition that Tate had paid the bills for the beef. At that time Tate was solvent, and the defendant could have recovered from him what had been erroneously allowed him in the account. There is a long series of cases which establish that if a person deals with an agent in such a way, either by giving him unreasonable credit, or otherwise, as to deceive the principal and alter the relative position of the

1882

DAVISON v. DONALDSON.

parties, the principal is discharged: *Irvine* v. *Watson* (1); *Heald* v. *Kenworthy* (2); *Armstrong* v. *Stokes* (3); *Smyth* v. *Anderson* (4); *Kymer* v. *Suwercropp* (5); *Smethurst* v. *Mitchell* (6); Leake on Contracts (2nd ed.), p. 503.

JESSEL, M.R. In the present case an appeal has been brought from the judgment of Mr. Justice Mathew at the trial of the action at Newcastle. The action was brought by a creditor against the defendant, who was part-owner of two ships, for the price of certain tons of beef supplied to C. Tate, who was co-owner and ship's husband. The invoices were in what we are told is the usual form in small transactions of this nature (with which I am not so familiar as with larger transactions), namely, "to the ship and to C. Tate." That being so, the meat was supplied for the use of the two ships between the months of April and September, 1877. Tate did not pay the creditor, but in December, 1877, he rendered an account to the owners of both the ships, in which he charged them with the meat so supplied.

It is not suggested by the defendant that at this time an unreasonable credit had been given to Tate; therefore the allowance of the payment to him on account was not made through any misrepresentation on the part of the creditor, but simply on the representation by the ship's husband that he had paid the creditor. The co-owner settled the account on the faith of this representation without calling for the vouchers which he was entitled to call for. No doubt in many cases principals may reasonably rely on the honour of their agents, and may not require vouchers: but when they come into a Court of law and seek to excuse themselves from liability, and it turns out that they have not required the production of vouchers, they must expect the Court to deal strictly with them. In the present case the defendant was not only co-owner of the ship, but co-adventurer with Tate. They were therefore strictly partners, and the beef was supplied for partnership purposes. Therefore the defendant was liable to the butcher for it; and is still liable to

(1) 5 Q. B. D. 102.
(2) 10 Ex. 739.
(3) Law Rep. 7 Q. B. 598.
(4) 7 C. B. 21.
(5) 1 Camp. 109.
(6) 28 L. J. (Q.B.) 241.

his executor. Then what is his defence? Although he settled his accounts with Tate in 1877, yet he says, "I was injured by you, the creditor, giving Tate credit; for two years after the first settlement I settled some other account with him, and I should not have settled that other account without deducting the amount which I allowed him on the former account, if I had known that you had not been paid. Your giving him credit led me to believe that he had paid you, and therefore I did not require him to repay it which I should otherwise have done. He was then solvent, and I lost my opportunity. Therefore, though I am liable at law, I have this equitable defence that you gave Tate unreasonable credit without telling me, and you have elected to take him as your sole debtor, and you cannot now sue me."

The question is, is this good law? What is the principle on which it proceeds? No doubt there is a well-known principle of equity which has been long acted on, sometimes by the Courts of Equity and sometimes by the Courts of Common Law, for the equity is the same in both Courts, that if the defendant has been misled by the plaintiff, either by his words or by his conduct, to believe that which is not true, so that his position is altered, the plaintiff cannot be heard to deny the truth of what he has thus led the defendant to believe. This is well laid down in *Irvine* v. *Watson*. (1) In that case the defendants had paid the broker and the question was whether that discharged their liability to the plaintiffs. Bramwell, L.J., says (2): "I think it is impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs and made such payment in consequence of such belief." Now, assuming that there is no distinction in this respect between a partnership and a case of principal and agent, that observation applies exactly to this case. The payment which the defendant made was not made in consequence of being misled by the plaintiff. The mere fact that by the conduct of the plaintiff he lost the opportunity of getting the money back, is not sufficient. Then Baggallay, L.J., speaking of Parke, B.'s observations in *Heald* v. *Kenworthy* (3), says (4): "He sought to limit

(1) 5 Q. B. D. 414.
(2) 5 Q. B. D. 416.
(3) 10 Ex. 739.
(4) 5 Q. B. D. 418.

1882

DAVISON v. DONALDSON.

Jessel, M.R.

the qualification of the general rule to cases in which the seller by some conduct has misled the buyer into believing that a settlement has been made with the agent. And if that limitation is correct, I am of opinion that there is no such payment as could discharge the defendants." And Brett, L.J., says (1): "And Parke, B., after citing the dictum of Bayley, J., to the effect that the seller cannot sue the principal if the state of the accounts between the principal and the agent would make it inequitable that he should do so, proceeds to ask what equity there can be, unless it is something arising out of the conduct of the seller, something to induce the defendant to believe that a settlement has already been made with the agent." And then referring to *Armstrong* v. *Stokes* (2), he says, "Probably this decision means this, that when the seller deals with the agent as sole principal and the nature of the agent's business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent." All the judges agreed in laying down that, where the seller knows that there is a principal behind the person with whom he is dealing, he must be shewn to have himself done something which raises an equity against him, otherwise the principal is not discharged; though I am far from saying that there may not be special cases in which mere delay on the part of the plaintiff would be held to be sufficiently misleading conduct; it may amount to a representation that he has been paid. The case of *Smethurst* v *Mitchell* (3) is an authority that where the goods are not to be delivered till the account is paid and yet the goods are delivered, whether the seller takes a bill of exchange or not, the seller cannot afterwards come upon the principal. The conduct of the seller would be treated as evidence of payment—it would be conduct which would naturally lead men of business to believe that the money had been paid. In that case, Hill, J., says, "A question may arise in such a case whether a vendor selling to a person whom he knows to be acting as the agent of an undisclosed principal is not bound to make inquiries, and may not be debarred from proceeding against the

(1) 5 Q. B. D. 420. (2) Law Rep. 7 Q. B. 598.
(3) 28 L. J. (Q.B.) 246.

principal, if there has been any alteration in the account between the principal and agent to the prejudice of the former at any time after the day of payment has arrived." Both in that case and in *Heald* v. *Kenworthy* (1), it is said that there must be a change of position between the principal and agent caused by the conduct of the seller. In the present case, it is clear that the payment of Tate on account, in 1877, was not caused by any dealing of the plaintiff with Tate. What occurred afterwards did not affect him at all. The principal cannot be heard to say that the subsequent conduct of the plaintiff induced him not to sue the agent for repayment of the money. Independently of the settlement of accounts there is no evidence that the mere abstaining from pressing the agent is an injury to the principal. A debtor must find out his creditor and go and pay him. When a person is supplied with goods it is his duty to see that the seller is paid.

There is no proof of the allegation of the defendant that by reason of the course of trade in the case of a ship's husband, the giving credit to the ship's husband affords sufficient evidence of an election by the creditor to discharge the principal debtor. There is no authority for such a proposition, nor is it within the equitable principle. Partners ought not to settle with their co-partners without satisfying themselves that the payments have been actually made. The decision appealed from must be reversed and judgment entered for the plaintiff.

LINDLEY, L.J. I am of the same opinion. The question in this case cannot be decided without having regard to the special facts which are in evidence. The action is brought for goods supplied to Tate for the use of two ships. These ships were owned by several owners, of whom the defendant was one, and Tate had an interest in them; and he was also joined with the owners in a joint adventure for which the ship was being prepared. So that Tate and the other owners were not only co-owners of the ships, but also co-partners. If so, they were jointly responsible with Tate. The plaintiff was in a better position than he would have been if he had only the option to sue either the agent or the undisclosed principal. The agent

(1) 10 Ex. 739.

1882

DAVISON v. DONALDSON.

Lindley, L.J.

and the principal were in this case partners, and the plaintiff could sue them both jointly. How has the defendant got rid of this joint liability? His defence is that he settled with Tate in 1877 for the payment of the money to the plaintiff in the account between Tate and the co-owners. But the defendant was not induced to settle with Tate in 1877 by the delay of the plaintiff. That is the vice of the defence. The way they put it is this. They say "We should in Tate's lifetime have re-adjusted our accounts with him, and instead of that we have had other transactions with him on the faith of his having paid the plaintiff, and have settled another account with him in 1879 on that basis." But is that a defence? It is disproved by the whole facts. There is nothing to shew that the defendant has been so misled as to disentitle the plaintiff from suing him. There is no evidence that the plaintiff knew anything about the settlement, or that by his conduct he induced them to make it. We should be going too far in saying that there was any such personal equity as precluded the plaintiff from suing the defendant. I do not say that mere delay may not be sufficient, under certain circumstances, to create such a personal equity. But there are no such special circumstances here.

BOWEN, L.J. I am of the same opinion. The goods were supplied to Tate as ship's husband. Primâ facie, therefore, the defendant, who was a partner in the adventure, is liable jointly with the other partners. The defendant has to get rid of this liability. He endeavours to prove that he and the other co-owners settled an account with Tate, and that they were induced to do so by the conduct of the plaintiff, which led them to believe that he had been paid by Tate. The settlement of the account between Tate and the co-owners was in 1877, and the sole ground on which the defendant relied at the trial was that this settlement of 1877 had been induced by the belief that the account had been settled between Tate and the plaintiff. But there had been no delay on the part of the plaintiff which could make them suppose that he had settled the debt. It is true that Tate represented to the co-owners that he had, but it was Tate's representation, not the delay of the plaintiff, which led to the settlement. The judge at the trial decided the case on this ground, that Tate was the person

to whom the plaintiff gave credit and that the defendant believed that credit had been given to Tate, and that Tate had settled with the plaintiff. Now, on the appeal, the defendant contends that the judgment may be supported on a different ground, namely, that the delay which took place after the settlement of accounts between Tate and the defendant changed their relative position to the injury of the defendant. This was not the ground on which the judge proceeded. But taking this new ground, there was a joint liability from which the defendant has to discharge himself. I do not say that in very special circumstances mere delay may not amount to misrepresentation: it may be conduct misleading the defendant. But that can only be when there is something in the original contract, or in the conduct of the parties, which renders the delay misleading. The creditor is not obliged to apply to all his debtors if he can get payment from one of them. This is the doctrine laid down in *Heald* v. *Kenworthy* (1), and sanctioned by the Court in *Irvine* v. *Watson* (2), and is consistent with Lord Ellenborough's judgment in *Kymer* v. *Suwercropp.* (3)

I think that the plaintiff must succeed, on the ground that there was no misleading conduct: whether, if there had been, and the defendant had been induced thereby to alter his position, he could have been discharged from his liability I prefer to give no opinion. The judgment will be reversed.

Solicitors for plaintiff: *Hopwood & Sons, for R. Purvis & Co., South Shields.*

Solicitor for defendant: *H. C. Coote, for H. Adamson, South Shields.*

(1) 10 Ex. 739. (2) 5 Q. B. D. 102.
(3) 1 Campb. 109.

M. W.

1882
June 20.

[IN THE COURT OF APPEAL.]

ALLUM AND ANOTHER *v.* DICKINSON.

Landlord and Tenant—Covenant to pay Rates—Paving Rate—"Rates charged upon the Premises or on the Occupier in respect thereof"—Metropolis Management Acts—18 & 19 *Vict. c.* 120, *s.* 105—25 & 26 *Vict. c.* 102, *s.* 96—*Practice—Appeal—Special Case—Appeal by Party not appearing at hearing.*

The lessee of a house in a new street within the metropolitan district for seven, fourteen, or twenty-one years, covenanted with his lessor to pay all rates and assessments taxed, rated, charged, assessed, or imposed upon the demised premises, or upon or payable by, the occupier or tenant in respect thereof:—

Held, that the proportion of the expense of paving the new street assessed upon the demised house under 25 & 26 Vict. c. 102, s. 96 was not a rate payable by the tenant under this covenant.

Whether a party to a special case who does not appear at the hearing before the Divisional Court can appeal from the judgment, *quære*.

APPEAL from the judgment of a Divisional Court of the Queen's Bench Division on a special case.

George Hearn, who was the lessee of a long term of years under a building lease of certain houses in Highbury New Park, Islington, by an indenture dated the 11th of December, 1872, demised one of them to the defendant, Kenrick Dickinson, at a rack rent, for a term of seven, fourteen, or twenty-one years at the lessee's option. The following covenant was contained in the indenture: "That the lessee will at all times during the said term pay the said yearly rent at the times and in manner aforesaid, and also will pay the sewers and main drainage rates, tithe rent charges, board of health, metropolitan, and other district rates and assessments which, whether parliamentary, parochial, or otherwise, now are or at any time during the said term shall be, taxed, rated, charged, assessed, or imposed upon the said demised premises or any part thereof, or upon or payable by the occupier or tenant in respect thereof (except the property or income tax)."

Highbury New Park, the street in which the house was situate, was a new street, and in 1880 and 1881 the vestry of St. Mary,

Islington, under the powers of the Metropolis Management Acts, paved it, and resolved that the expenses of so doing should be apportioned between the several owners of the houses and land adjoining the new street.

The proportion of the expenses apportioned to the defendant's house was 78*l.* 8*s.* 8*d.*, which sum the plaintiffs, who were the executors of G. Hearn, paid, as they were required to do, to the vestry clerk of the parish.

The plaintiffs then demanded repayment of the sum from the defendant under the terms of his covenant, and a special case was settled to take the opinion of the Court upon the question whether the plaintiffs were entitled to recover the said sum of 78*l.* 8*s.* 8*d.* from the defendant.

When the special case was called on before the Divisional Court, consisting of Mathew, J., and Cave, J., the plaintiffs did not appear, in consequence of some mistake or inadvertence on the part of their solicitors. The Court, however, read the special case, and having heard the counsel for the defendant, gave judgment in favour of the defendant in the absence of the plaintiffs.

The plaintiffs appealed from this decision.

R. T. Reid, for the plaintiffs.

[JESSEL, M.R. Can we entertain the appeal in this case? In an ordinary case, if the plaintiff does not appear and lets judgment be taken against him by default, he cannot appeal. If there has been a mistake he must apply to the Court of first instance to have the case restored and reheard: *Walker* v. *Budden*. (1)]

A special case is on a different footing from an action. The facts are all agreed on and the Court has the same materials on which to decide as if all the parties were present. In this case the judges read and considered the special case.

[The counsel for the defendant said that they had no objection to the appeal being heard.

JESSEL, M.R. Then we will hear the appeal, but it must not be drawn into a precedent as to the practice in special cases.]

The question mainly turns upon the construction of the 105th

(1) 5 Q. B. D. 267.

1882

ALLUM v. DICKINSON.

section of the Metropolis Management Act, 1855 (1), and the 96th section of the Metropolis Management Act, 1862. (2)

The effect of these sections is that although the payment is charged upon the owner ultimately, it is also charged and imposed upon the occupier, for power is given to recover it against him. Although by the Act the sum paid by the occupier may be deducted by him from his rent, that is only in the absence of express contract. It is in the power of the parties to negative this right and throw the burden entirely on the occupier.

But the covenant contains also the words "charged, assessed, or imposed upon the premises." This rate has certainly been assessed upon the premises, and it may also be said to be charged on them, for it can be made a charge on them by the local authority if the owner does not pay it: *Hartley* v. *Hudson* (3); *Budd* v. *Marshall*. (4)

(1) 18 & 19 Vict. c. 120, s. 105. In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish in which such street is situate, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same shall be so paved, then and in either of such cases such vestry or board shall make and effectually pave the same either through the entire width of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the actual expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board).

(2) 25 & 26 Vict. c. 102, s. 96. It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act (18 & 19 Vict. c. 120), or this Act either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be received in manner authorized by the recited Act and this Act; and the owner shall allow such occupier to deduct the sum of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of such rent . . . . Provided always that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property, whereof it is or may be agreed that the occupier shall pay or discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatever between landlord and tenant.

(3) 4 C. P. D. 367.

(4) 5 C. P. D. 481.

F. O. Crump, and *H. F. Manisty*, for the defendant, the tenant, were not called on.

1882

ALLUM v. DICKINSON.

JESSEL, M.R. I am of opinion that the judgment of the Divisional Court was right. I must say that in the circumstances of the case I should have thought it was not likely that it was intended that this rate should be made payable by the tenant. The lease was at a rack rent for seven, fourteen, or twenty-one years, and the charge in question was for making a new street, which was a charge naturally payable by the owner. The tenant is not usually made liable to any charges for the permanent improvement of the property. But this is not conclusive. Then there is another circumstance in favour of the tenant. The other charges mentioned in the covenant are annual charges; but this is a payment which is to be made once for all, and is not therefore similar to the other payments which are to be thrown on the tenant.

We now come to the actual words of the covenant. Is this a payment which is "taxed, rated, charged, assessed, or imposed upon the demised premises, or upon or payable by the occupiers or tenant in respect thereof"? If we look at the section of the Act of Parliament, namely, the 96th section of 25 & 26 Vict. c. 102, it is certainly not charged or imposed on the premises. It is imposed on the owner in respect of the premises. It is a personal demand on the owner, which may be enforced on his premises.

Then is it also charged or imposed upon the occupier? It is plain from the 96th section that it remained a charge on the owner. It is originally imposed on the owner, and then the section says that it may be recovered either from the owner or occupier. The Act requires the owner to pay the whole charge, but says that it may be recovered from the occupier and may be deducted by him from the rent payable to the owner. Therefore it is not a charge on the occupier; it is a charge on the owner with a remedy against the occupier.

On all these grounds I am of opinion that the payment is not within the covenant, and that the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. It is plain that when the statute is looked at the payment is not within one part

1882

ALLUM v. DICKINSON.

of the covenant, that is, it is not charged or imposed upon the premises. But is it charged or imposed upon the occupier or tenant in respect of the premises? I am of opinion that that is not the true construction of the section. I think that it is imposed upon the landlord, although power is given to recover it against the occupier.

BOWEN, L.J., concurred.

Solicitors for plaintiffs: *Billing & Kent.*
Solicitor for defendant: *W. F. Nokes.*

M. W.

July 4.

[IN THE COURT OF APPEAL.]

EATON AND ANOTHER *v.* WESTERN AND OTHERS.

Master and Servant—Apprentice—Unlawful Command—Change of Locality of Business—Outdoor Apprentice—Division of Business.

The plaintiff was bound apprentice to the defendants and their partners and successors in business in the trade of an engineer; and his father covenanted to provide him with board, lodging, and other necessaries. At the date of the indenture the business was carried on by the former defendants in London, where also the father of the apprentice resided, but there was no stipulation in the indenture as to the place where the business should be carried on. Before the term of the apprenticeship expired the defendants' partnership was dissolved and two firms established, one in London consisting of two of the defendants, and the other at Derby consisting of the other two; the manufacturing part of the old business being carried on at Derby and the selling part in London. The defendants called on the plaintiff to attend at the place of business at Derby:—

Held, that there was an implied stipulation that the contract was to be performed at the place where the business was carried on and the parties resided at the date of the indenture; and that the direction to the apprentice to go to Derby was an unreasonable command which he was not bound to obey.

Held, also, that as the business was not carried on in its entirety by either of the two new firms, neither of them was the successor of the original firm or entitled to the services of the apprentice.

Royce v. *Charlton* (8 Q. B. D. 1) overruled.

BY an indenture of apprenticeship, dated the 12th of January, 1877, and made between William Eaton, of Lambeth Road, and William Eaton, his son (the plaintiffs), of the one part, and C. R. Western, J. E. Carfrae, and M. R. Western, of Victoria Works, Belvedere Road, Lambeth, mechanical engineers, co-part-

ners (the defendants), of the other part, William Eaton (the son), with the consent of his father, put himself apprentice to the defendants and to the successor or successors of them, and to such other person or persons as might from time to time carry on the business then carried on by them, either in co-partnership with or in succession to them, or any of them (all of whom were thereinafter included in the term "the firm") to learn the art, trade, or business of an engineer, and with the firm after the manner of an apprentice to serve from the 8th of August, 1876, until the full term of six years. The indenture contained the usual covenants by the apprentice to serve his masters faithfully and obey their lawful commands, and not to absent himself from their service unlawfully. And W. Eaton (the father) covenanted with the firm that he would at all times during the said term provide his said son with suitable board, lodging, washing, and clothes, and all other necessaries. And the defendants covenanted with the apprentice and his father that the firm would teach, or cause to be taught, the said apprentice in the said trade or business in such manner as was usual in such case, and to pay him a certain weekly sum for wages, ranging from 5*s.* per week in the first year to 15*s.* per week for the last year of the said term.

There was no stipulation in the indenture as to carrying on the trade at any particular place.

By an indenture, dated the 30th of June, 1879, and made between the defendant C. R. Western, of the first part, the defendant J. A. Carfrae, of the second part, the defendant M. R. Western, of the third part, and F. J. Odling, of the fourth part, it was agreed that the partnership between the defendants should be dissolved, and that two firms should be formed, namely, the Derby firm, to consist of C. R. Western and F. J. Odling, which was to take a piece of land at Derby and erect a factory thereon, and carry on the business of mechanical engineers there, and the London firm, to consist of J. N. Carfrae and M. R. Western, which was take over a lease of certain railway arches in Belvedere Road, and carry on the business of mechanical engineers there. It was further agreed that the good will of the present firm should belong equally to the Derby firm and the London firm; that the London firm should have the exclusive agency for the sale in

1882

EATON v. WESTERN.

certain named parts of England of the manufactures of the Derby firm, included in certain specified classes, and the London firm were prohibited from selling machines of such specified classes except of the manufacture of the Derby firm without their consent; and further, that after the 30th of June, 1880, the London firm should not be entitled any longer to trade under the old name of the firm "Western & Co.," which should be reserved for the exclusive use of the London firm.

On the 18th of October, 1879, the defendants gave notice to their apprentices that on and after Friday, the 24th of October, the factory would be removed to the new works, Chaddesdon Hill, Derby, and all apprentices were to present themselves at the works at Derby on that day. Every apprentice was to be allowed a free railway ticket and a certain sum for expenses of removal, and 2*s.* per week extra wages during the remainder of his apprenticeship. Any apprentice who did not wish to remove to Derby might have his indentures cancelled, provided be applied before the 24th of October, in which case the firm would give him four weeks' wages as a present.

W. Eaton refused to go to Derby, and on the 4th of November, 1879, the defendants refused to continue him as their apprentice, alleging as a reason his refusal to go to work at Derby.

W. Eaton and his father then brought this action in the Southwark County Court, claiming 50*l.* damages from the defendants for breach of the covenants in the indenture of apprenticeship.

At the trial of the action in the county court the defendant, M. R. Western, stated in his evidence that the firm of "Western & Co." was dissolved on the 30th of June, 1879, and that the manufacturing part of the business of the firm was carried on at Derby, and that the business carried on by the London firm was one of repairs and of agency for the Derby firm. Judgment was given for the plaintiffs with 50*l.* damages.

A special case was settled for the opinion of the High Court of Justice in which the above facts were set forth, the question for the opinion of the Court being whether there had been any breach of the indenture of apprenticeship for which the defendants were liable to the plaintiffs.

1882

EATON v. WESTERN.

The case was heard on the 29th of March, 1882, before the Divisional Court, consisting of Mathew and Cave, JJ., who reversed the judgment of the county court judge, considering themselves bound by the authority of *Royce* v. *Charlton* (1), but they gave leave to appeal in order that the point decided in that case might be reviewed.

Ribton, for the plaintiffs. There are two objections to the order which the defendants gave to the apprentice. In the first place they had no right to require him to attend at the factory at Derby. *Royce* v. *Charlton* (1) is an authority against the plaintiffs, but this Court is not bound by that decision. The question is whether in the absence of an express stipulation as to the place at which the apprentice is to attend for the purpose of being taught his trade, it is a reasonable command to require him to attend more than 100 miles from his father's home. It might be different if the apprentice was boarded and lodged in his master's house, and formed part of his family, but here the apprentice was to be boarded and lodged by his father: *Brook* v. *Dawson*. (2)

In the second place the Derby firm were not the successors of the original firm nor was the business which was carried on at Derby the same as the original business. The business was divided, and the trading part was carried on in London, and the manufacturing part at Derby. The apprentice had a right to be taught the business in its entirety, and he could not have this advantage at either of the two places. The altered state of circumstances was not in the contemplation of the apprentice or his father when they executed the indenture, and they are no longer bound by their covenants: *Baily* v. *De Crespigny* (3); *Newby* v. *Sharpe*. (4)

Verney (*Charles, Q.C.*, with him), for the defendants. With respect to the first point, all the arguments now urged were considered by the judges in *Royce* v. *Charlton* (1), and were held to be untenable. If the balance of convenience and inconvenience be considered the convenience is in favour of the construction which the defendants put upon the covenant. An apprentice

(1) 8 Q. B. D. 1.
(2) 20 L. T. 611.
(3) Law Rep. 4 Q. B. 180.
(4) 8 Ch. D. 39.

1882

EATON v. WESTERN.

must be taught practically, and it is reasonable that he should be required to attend wherever the factory is. *Coventry* v. *Windal* (1) is an authority that a master may send his apprentice to a different part of England. It is not correct to say that the present state of circumstances was not in the contemplation of the parties at the time of the contract. The apprentice was bound not only to serve the original firm but their successors. The words of the covenant pointed to a change in the firm. Practically speaking, the business is not divided, for all the manufacturing part, which the apprentice had to be taught, is carried on at Derby, where he was told to attend.

JESSEL, M.R. In form this is an appeal from the judgment of the Divisional Court, consisting of Mathew and Cave, JJ., but in fact, from the decision in *Royce* v. *Charlton.* (2) The judges felt themselves bound by the decision in that case, and therefore gave leave for this appeal, in order that the decision in *Royce* v. *Charlton* (2) might be reviewed. I must say I think that case was not rightly decided, and we decide the present case on the first point with the understanding that in effect it overrules *Royce* v. *Charlton.* (2) In that case the parties were living at Mansfield, where the indentures were executed, and the appellant removed from Mansfield and went to become the managing director of a house of business at Leicester, and wanted the apprentice to follow him there. The objection made was that this was not within the contemplation of the parties when the indentures were executed. The mother of the apprentice had to provide him with board and lodging, and was it to be supposed that she intended to do this everywhere? It merely was meant to be within a reasonable distance of her own residence. It is a reasonable construction of the covenant that the master was not to require the apprentice to live at another part of England.

The masters in the present case carried on the business at Lambeth. The father also lived at Lambeth, and covenanted that he would at all times during the term of the apprenticeship, provide his son with suitable board, lodging, washing, and clothes, and all other necessaries. It is plain that it means that the father

(1) Brownl. 67. (2) 8 Q. B. D. 1.

shall keep and maintain his son within a reasonable distance of Lambeth, where he lives. Then the firm removes to Derby. Can it be expected that the father should find his son lodging and board at Derby? Therefore, I think it was not a reasonable command of the masters that the apprentice should follow them to Derby.

But there is another point in the case. The covenant in the indentures is that the apprentice should serve "the firm," which was defined to be the defendants and the successor or successors of them, and such other persons as might from time to time carry on the business then carried on by them either in copartnership with or in succession to them or any of them. But the firm was dissolved and split into two firms, one carrying on business in London and the other at Derby. The Derby firm carried on the manufacturing part of the business and the London firm the repairing and agency part of the business. Neither firm can be said to carry on the business which was carried on at Lambeth at the date of the indenture. It is impossible to say that the business carried on by either firm comes within the words "now carried on by them." This point also must be determined in favour of the plaintiffs.

SIR JAMES HANNEN. I am of the same opinion. The question arises in this form, whether it was a reasonable command that the apprentice should go to Derby. The answer must entirely depend on the circumstances, and in the circumstances of this case I think it was not a reasonable command. There is a broad distinction between this case and that of an apprentice taken into the house. In the latter case I am inclined to think that the master would be entitled to take the apprentice with him if he removed to another place, and that it would be beyond the power of the apprentice to refuse to go. But here the apprentice was not in the house, but was provided with board and lodging by his father. Can it be reasonable that he should be called on to go and live in a distant part of England under entirely different circumstances? I do not think this was a lawful command.

But I also agree with the Master of the Rolls that the business of the firm who gave him the order was not the same business as

1882

EATON v. WESTERN.

that to which he was apprenticed. It has been split into two parts, neither of which is the same business as the original one. The apprentice looked to the advantage of being educated in a firm carrying on the business in its entirety, and he is entitled to see the business of buying and selling as well as the mere manufacturing. But now that the business has been split into two it appears to me that neither of the firms represent the original firm, and is entitled to command the services of the apprentice.

LINDLEY, L.J. I am of the same opinion. I agree that the original firm is not represented by either of the two firms into which it has been split. Neither of the two is, properly speaking, the successor of the original firm. However, the more important point is the right of the defendants to order the apprentice to go to Derby. The authorities on the subject are very meagre. In *Coventry* v. *Windal* (1) it was held that an apprentice to a surgeon was not obliged to go to the West Indies at the command of his master, but that he might be sent to any part of England. It appears in that case that the apprentice was part of the family of the surgeon; also that the surgeon did not himself go with him to the West Indies. That decision is intelligible. The apprentice here is not part of the family, but is to be boarded and lodged by his father, not by his masters, and he is to attend daily at the place of business. I cannot say that it was a reasonable and lawful command that he should live more than a hundred miles from his father's place of residence. There is no authority adverse to our decision except *Royce* v. *Charlton* (2), from which this is in effect an appeal. I do not say that a removal of the business to a small distance would be material, but when the removal necessitates a change in the place of residence of the apprentice I think it is contrary to the intention of the parties, and cannot be enforced against the apprentice.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Bordman & Co.*

Solicitors for defendants: *Western & Sons.*

(1) Brownl. 67. (2) 8 Q. B. D. 1.

M. W.

[IN THE COURT OF APPEAL.]

1882
July 7.

MORGAN *v.* THOMAS.

Will—"Issue and their Heirs"—Gift over on Death without leaving Children—Estate for Life or Estate Tail.

The owner of land devised it to his eldest son L. "for life, and after his decease to his lawful issue and their heirs for ever, if any," and "if he should die without leaving any children born in wedlock" then to the testator's son E. and his heirs:—

Held, affirming the decision of Cave, J., that the devise gave a life estate only to L., and not an estate tail.

APPEAL from the judgment of Cave J. (1)

The action was brought for the recovery of a farm-house and land. The plaintiff was the heir-at-law of Evan Thomas, and claimed under a devise in the will of Lewis Thomas, the former owner of the premises, dated the 30th of October, 1834, which was in the following terms:—

"I give, devise, and bequeath to my eldest son Lewis Thomas all my freehold property whatsoever and wheresoever situate, during his natural life, and after his decease to his lawful issue and their heirs for ever, if any: if he shall die without leaving any children born in wedlock I give the said freehold property to my son Evan and his heirs for ever."

The testator died in November, 1834, seised of the premises, leaving his sons Lewis and Evan surviving; and Lewis thereupon took possession of the premises.

Lewis died in January, 1881, without having been married. Evan died in October, 1857, intestate. The defendant on Lewis's death took possession of the premises.

The defendant in his statement of defence alleged that Lewis Thomas took an estate tail in the premises, and that he executed a disentailing deed to his own use, and afterwards devised the premises to the defendant.

The plaintiff demurred to this statement of defence, and on the hearing of the demurrer Cave, J., held that Lewis Thomas had only an estate for life in the premises, and accordingly allowed the demurrer, and gave judgment for the plaintiff.

The defendant appealed from this judgment.

(1) 8 Q. B. D. 575.

1882

MORGAN v. THOMAS.

Upjohn, for the defendant. The effect of the devise was to give an estate tail to Lewis Thomas. "Issue" is, primâ facie, a word of limitation, not of purchase, and the words "and their heirs" are mere words of surplusage. The subsequent words "if he shall die without leaving any children" will not limit the meaning of "issue" in the previous gift. The word "children" has a flexible meaning, and the expression means the same as if he shall die without issue: *Montgomery* v. *Montgomery* (1); *Roe* v. *Grew* (2); *King* v. *Burchell* (3); *Frank* v. *Stovin* (4); *Phillips* v. *James* (5); *Wright* v. *Pearson* (6); *Raggett* v. *Beaty* (7); *Doe* v. *Simpson* (8); *Bacon* v. *Cosby* (9); *Egan* v. *Morris* (10); *Rodd* v. *Fitzgerald* (11); *Doe* v. *Webber* (12); *Lyon* v. *Mitchell* (13); Fearne's Contingent Remainders, ch. i. s. 5, p. 26; Jarman on Wills, vol. ii. p. 405.

Anstie and *McIntyre*, for the plaintiff, were not called on.

JESSEL, M.R. The case has been argued in the only way it could have been argued, namely, that we are to disregard the ordinary rules of construction with respect to this will and, without any reference to reason, to hold ourselves bound to construe it contrary to its obvious meaning, having regard to certain cases respecting other wills which have settled the law in such a way that we must so construe it. No doubt there are authorities with reference to real property that are binding upon us and may have that effect, and therefore in stating that that is the mode in which it was argued, and the only mode in which it could be argued, I am by no means reflecting upon the arguer. First of all what does the will mean? That is the first point to be considered, and we must look at the words very carefully. I may say in passing that it is a will under the old law. The testator gives to his eldest son "all my freehold property whatsoever and wheresoever situate during his natural life." Now although those words during his natural life may be sometimes disregarded, and have been disregarded in cases which come under

(1) 3 J. & Lat. 47.
(2) 2 Wils. 322.
(3) Amb. 379.
(4) 3 East, 548.
(5) 3 D. J. & S. 72.
(6) Amb. 358.
(7) 5 Bing. 243.
(8) 4 Bing. (N.C.) 333.
(9) 4 De G. & Sm. 261.
(10) Ll. & G. temp. Plunkett, 297.
(11) 6 H. L. C. 823.
(12) 1 B. & Ald. 713.
(13) 1 Madd. 467.

the rule in *Shelley's Case* (1), they are words of great importance in construing the will and must not be forgotten. Then the will goes on, "and after his decease to his lawful issue and their heirs for ever, if any." The words "if any," of course refer to the issue. Therefore the gift is not to "heirs" but to "issue." "If he shall die without leaving any children born in wedlock, I give the said freehold property to my son Evan and his heirs for ever." The first observation to be made is that the words are "his lawful issue and their heirs for ever." Now "their heirs for ever," are technical words of limitation in use at the time for describing an estate in fee, therefore, primâ facie, the effect of the gift to the issue and their heirs for ever is to give the issue an estate in fee. The words are "their heirs," therefore "lawful issue" is used in the plural. It is obvious on reading the will that the testator thought they took together; it is not consistent with that word as used there to read it to the first son, and then to the second son, and then to the third son, and so on, which is the way an estate tail would devolve unless the sons left children, and if they left children it would be to the first son, and then his eldest son, and so on. It does not fit naturally. Then he says, "If he should die without leaving any children born in wedlock." We must see what he means by "lawful issue," and what he means by "children?" First, what does "issue" mean? "Issue" has a popular meaning, being often used in the sense of "children," and a legal or technical meaning, being used in the sense of "descendants," and the question is in which sense it is used by the testator. It is a term of flexible meaning. "Children" again has a popular meaning. It is used in the sense of the offspring of the first generation, and it has a legal meaning which is the same, but it is quite true you can have a context which shews that "children" was not used in the sense of "children," but in some other sense; and you can have a context of that kind with respect to almost any word in the language. I have often commented on this, and I used a rather ludicrous example in the Rolls Court that I will repeat here, to shew that the way we sometimes deal with words is an erroneous method of applying the rules of construction. You will find it said in some cases that "or" means

(1) 1 Rep. 936.

1882

MORGAN v. THOMAS.

"and;" but "or" never does mean "and;" unless there is a context which shews it is used for "and" by mistake. The instance I have given is this. Suppose a testator said, "I give the black cow on which I usually ride to A. B.," and he usually rode on a black horse; of course the horse would pass, but I do not think that any annotator of cases would put in the marginal note that "cow" means "horse." You correct the wrong word used by the testator by the context; when you find it was an animal on which he daily rode, you would say he meant a horse, he would not ride a cow in this country. It is not that the word has a different meaning from that which it usually bears, but the context shews the testator has by mistake used one word for another. I apply this illustration to shew the difference in treating the words "children" and "issue." The word "children" has, both in law and common parlance, only one meaning, though you may by a context shew it is improperly used; that it is written by mistake for descendants or something else. But the word "issue" has two meanings, it may mean "descendants," and it may mean "children," the common use of the word in ordinary parlance being "children," though in legal parlance its proper meaning is "descendants." You require a context of a different character to shew that the testator has made a mistake in writing one word for another from what you do when you wish to ascertain which of two meanings that the word properly bears is to be affixed to it. Looking at it in this way, it appears to me that in this case we must read "issue" as meaning "children," and "children" as meaning "children," and in no other sense; and if so of course the defendant fails.

Now is there anything else? There is a long series of authorities quoted by Mr. Upjohn with a research that does credit to him, which shews this, that every one of the expressions I have referred to standing alone will not do to restrict the first estate to a life estate; that there are cases in which express estates for life have not been held to be sufficient indication to prevent the general intention being carried out by giving the devisee a larger estate than an estate for life. There is one case in which "their heirs" occurs; that is followed by a general gift over without issue, which probably determined the case. There are cases in

which "if any" is used which alone will not do; and I have no doubt there is a case in which a gift over without any children will not do: but still there is no case that I am aware of where all these things combined have been held insufficient, and therefore we are not overruling or interfering with any decision which says when we find this particular combination we may not give effect to what appears to be the fair meaning of the words of the will, and carry out the expressed intention of the words.

It is unnecessary for me, after the elaborate judgment of Mr. Justice Cave, to refer to what Lord St. Leonards says, but I agree with the learned judge in the Court below that there is enough in *Montgomery* v. *Montgomery* (1) and the cases there cited to cover this case, if we wanted technical authority for that purpose, and in my opinion the appeal must be dismissed.

SIR JAMES HANNEN. So far as I have been able to examine the authorities, I find the general result to be that though "issue" primâ facie is a word of general meaning it is flexible, and may mean "children" and become a word of purchase. Here in the first place it is followed by the words "and their heirs for ever," which, according to the dictum of Lord St. Leonards in *Montgomery* v. *Montgomery* (1) will make the issue take as purchasers, so that the first devisee takes an estate for life and not an estate of inheritance. And this is the view of Lord Hatherley in *Kavanagh* v. *Morland.* (2) But further, it appears to me the gift supplies a context which tends to shew that "issue" in this passage in question means children. The gift over is to take effect if the son Lewis should die without leaving any children. The testator, as Lord St. Leonards says, translates his own language, and shews that by issue he meant children, and for these reasons I concur.

LINDLEY, L.J. I am of the same opinion, and I agree in the appeal being dismissed with costs.

Solicitors for plaintiff: *Crowder, Anstie, & Vizard, for T. Rees, Cambridge.*

Solicitor for defendant: *Wrentmore, for James & Co., Aberdare.*

(1) 3 J. & Lat. 47. (2) Kay, 16.

M. W.

1882
June 13.

[IN THE COURT OF APPEAL.]

MERSEY STEEL AND IRON COMPANY *v.* NAYLOR, BENZON, & CO.

Contract—Rescission of Contract—Refusal to be Bound—Winding-up—Set off of unliquidated Damages in Action.

The defendants agreed to purchase from the M. Co. a large quantity of steel to be delivered on board ship in five monthly instalments, commencing with January, 1881, payment to be made within three days after receipt of the shipping documents. In January, 1881, the company delivered about half the first instalment, but before the payment became due a petition was presented on the 2nd of February to wind up the company. The defendants were advised by their solicitor that they could not without leave of the Court safely pay the company pending the petition, and asked the company to obtain an order of the Court to sanction their doing so. On the 10th of February the company replied that they should treat the refusal to pay as releasing the company from any further obligation to carry out the contract. On the 15th of February a winding-up order was made. The defendants' solicitor, on the 17th of February, wrote to the liquidator that the defendants claimed damages for non-delivery in January, and were prepared to accept and pay for all further deliveries without deducting damages if the payments were carried to a separate account subject to their claims for damages. He further suggested that the defendants would probably be willing to accept the January instalments and waive damages. The liquidator refused to make any further deliveries and commenced an action to recover the price of what had been delivered. The defendants set up a counter-claim for damages:—

Held, reversing the decision of Lord Coleridge, C.J., that the defendants had not, by postponing payment under the erroneous advice of their solicitor, so shewn an intention no longer to be bound by the contract as to release the plaintiffs from further performance of it, and that the plaintiffs were liable for damages for non-delivery.

Freeth v. *Burr* (Law Rep. 9 C. P. 208) approved:

Held, also, that in an action by a liquidator for a debt, the defendant may set off a claim for unliquidated damages, and may without leave of the Court in the winding-up raise that defence by counter-claim.

On the 22nd of December, 1880, an agreement was entered into by which the plaintiffs agreed to sell and the defendants to purchase 5000 tons of steel blooms to be delivered on board at Liverpool by instalments of 1000 tons monthly, commencing with January, 1881, payment to be made within three days after receipt of shipping documents.

On the 31st of January, 1881, the plaintiffs, who had earlier in the month delivered 120 tons 13 cwt. 1 qr., delivered 211 tons

4 cwt., price 1161*l.* 12*s.*, which became payable on the 5th of February, 1881. At the beginning of February, 1881, they delivered 260 tons 11 cwt. 1 qr., price 1433*l.* 1*s.* 11*d.*, which became due on the 8th of February, 1881, making a total amount of 2594*l.* 13*s.* 11*d.*

On the 2nd of February, 1881, a petition was presented in the Court of the County Palatine of Lancaster to wind up the company.

On the 7th of February the defendants wrote to the company stating that they understood that a petition had been presented to wind up the company, and expressing a doubt whether they could safely make any payment till the petition was disposed of, and asking whether it had been presented and when it would be heard.

On the 8th the company replied that a petition had been presented and stood for hearing on the 15th in the Court of the County Palatine of Lancaster. "What will be the result of the petition we cannot say, but if in the meantime we are to continue to deliver blooms under your contract, we must ask you to be good enough to observe your part of the contract by remitting to us promptly. Your early decision is all-important, and we must beg for answer by wire in the morning. If you decline to do this we shall consider the contract at an end at once."

The defendants wrote in answer on the 9th: "We are most anxious not to put you to any inconvenience, but we are advised by our solicitors (of whose letter we send you a copy) that we ought not to make the payment under the present circumstances. His letter points out, as you will see, the way of getting over the difficulty, and we hope you will adopt it immediately."

In the letter referred to the solicitor expressed the opinion that by reason of sect. 153 of the Companies Act, if the defendants made the payment they might be called upon to pay again, and suggested the obtaining from the Palatine Court an interlocutory order authorizing the company to receive the payment they asked for, and to go on making deliveries under the contract, and to receive payments for them, which order he considered could be obtained as a matter of course.

On the 10th of February the company replied, "Our solicitors advise us that the section named relates only to the parting with or disposing of property, and not to the receipt of property or

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

money. We shall, therefore, consider your refusal to pay for the goods already delivered as a breach of contract on your part, and as releasing us from any further obligations on our part."

On the 11th the defendants answered this letter by a short note inclosing a letter from their solicitor advising again that a payment could not be safely made without the sanction of the Court, and that the delay of payment, whether right or wrong, did not justify the company in treating the contract as at an end. The company, on the 12th, replied that the position taken up by the defendants' solicitors was untenable. Some correspondence then ensued between the solicitors of the company and the solicitors of the defendants, which led to no conclusion.

On the 15th of February a winding-up order was made, and on the 16th the solicitors of the company wrote to inform the defendants' solicitors of that fact, and that Mr. Banner had been appointed provisional liquidator.

On the 17th of February the defendants' solicitors wrote to the solicitors of the company asking what the liquidator proposed to do. The letter stated that a question arose as to damages due to the defendants for failure to deliver the January instalment, which damages he apprehended that they had a right to deduct. The letter then proceeded, "My clients are prepared to accept all deliveries which Mr. Banner may make in pursuance of the contract, and to pay him such sums as are due from them under the contract, taking all parts of it together, and I should advise them, to prevent any present difficulty, to pay Mr. Banner for any deliveries without any deduction on account of damages, on his consenting, with the authority of the Court, to keep the payments to a separate account, and that they shall be made without prejudice to our claim to deduct the damages. Or I think it probable that my clients would consent to accept delivery now and waive the damages. Please let me hear from you."

On the 24th the solicitors of the company wrote to the solicitors of the defendants, informing them that an order had been made for the provisional liquidator to carry on the business as before. On the 28th the defendants' solicitors wrote asking why no deliveries had been made that month, and stating that the defendants had always been and still were ready to accept such deliveries

and make such payments as ought to be accepted and made under the contract.

The solicitors of the company replied on the 1st of March: "The liquidator has discontinued deliveries because Messrs. Naylor & Co. withhold payment of the balance remaining due. We are instructed to bring an action against them to enforce payment."

The defendants' solicitors, on the 2nd, answered that they hoped they were not to understand from this letter that the liquidator refused to make any further deliveries. The solicitors of the company on the following day wrote that the failure of the defendants to pay for the deliveries made prior to the presentation of the petition was a breach of contract which disentitled them to any further deliveries. The defendants' solicitors wrote to ask whether it was the determination of the liquidator not to make any further deliveries, and on the 5th the solicitors of the company replied that the liquidator would make deliveries at the price of the day, the defendants to have a right of proof for the difference, and to pay at once for past deliveries.

The defendants thereupon sent the liquidator a cheque for 881*l.* 13*s.* 2*d.*, stating that they should retain the balance on account of damages for breach of contract, and should be prepared to defend any action the liquidator might be advised to bring.

The company accordingly commenced an action to recover 1713*l.* 0*s.* 9*d.*, the balance of the 2594*l.* 13*s.* 11*d.*, after deducting the 881*l.* 13*s.* 2*d.*

The defendants delivered their defence, and set up by way of counter-claim that, in January, 1881, before any breach by the defendants in anything to be done by them under the contract, the plaintiffs committed a breach by only delivering 331 tons, 17 cwt. 1 qr. instead of 1000 tons, and that subsequently in February or March, 1881, before the delivery of the contract quantity for either of those months the plaintiffs wrongfully repudiated the contract, and refused any further to perform the same, and the defendants claimed 2500*l.* damages.

The plaintiffs by their reply raised the objection that the defendants had not obtained leave under the Companies Acts to make or prosecute any set-off or counter-claim, and that under the

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Acts they were not entitled to recover in respect of the counter-claim, or to reduce or extinguish the plaintiffs' claim by set-off.

Lord Coleridge, C.J., held that the defendants had been guilty of such a breach of the contract as entitled the plaintiffs to treat it as at an end, and had therefore no claim for damages against the plaintiffs. Judgment was accordingly given for the plaintiffs. The defendants appealed.

Sir Farrer Herschell, S.G., and *Bigham*, for the defendants. The mere failure of one party to perform part of the contract does not entitle the other party to say that the contract is at an end. There must be something indicating an intention not to perform it any further: *Freeth* v. *Burr* (1), *In re Phœnix Bessemer Steel Co.* (2), *Simpson* v. *Crippin.* (3) The cases are collected in *Honck* v. *Muller* (4), but the decision does not touch the present case, and the Lord Chief Justice was wrong in holding that under the circumstances the non-payment by the defendants entitled the plaintiffs to repudiate. There are no facts from which it can be reasonably inferred that the defendants refused to go on any further with the contract.

Then the second point with which the Lord Chief Justice did not deal is, whether if the defendants are right on the first point, they can set-off the damages. Unliquidated damages in bankruptcy can be set off in an action: *Peat* v. *Jones.* (5) It is said that the counter-claim is an action, and that the defendants had no leave to bring it.

[JESSEL, M.R. That is a very narrow ground. I do not think we shall have much difficulty in dealing with that.]

Gray v. *Raper* (6) and *Henderson* v. *Peruvian Ry. Co.* (7) are against allowing such an objection. Set-off is provided for by Order XIX., rule 3.

[JESSEL, M.R. Did the legislature intend by the Judicature Act to interfere with the course of winding up?]

Before the Judicature Act there was no set-off of damages, but

(1) Law Rep. 9 C. P. 208.
(2) 4 Ch. D. 108.
(3) Law Rep. 8 Q. B. 14.
(4) 7 Q. B. D. 92.
(5) 8 Q. B. D. 147.
(6) Law Rep. 1 C. P. 694.
(7) 16 L. T. (N.S.) 297.

this was not owing to anything in the Companies Act; it was because unliquidated damages never could be set-off.

[JESSEL, M.R. Set-off is the creature of statute law. You must shew us statutory authority to set-off.]

Since the Judicature Act you can do with unliquidated damages everything you could formerly do with liquidated demands. The bankruptcy rule is imported into winding-up by the Judicature Act, 1875, s. 10: *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1) The observation of Bacon, V.C., in *Campbell's Case* (2), is in the defendants' favour. The mutual credit clause in the Bankruptcy Act, 1869, s. 39, is imperative that there shall be a set-off, and that only the balance shall be proved for. In the case of *In re Withernsea Brickworks* (3) a bankruptcy rule was held not to be imported by s. 10 of the Act of 1875; but that decision went on the ground that the question related to bringing in something as assets which apart from the Act would not be assets. That reason does not apply here.

[JESSEL, M.R. So far as we can it is desirable to construe the Acts so as to make the same law apply to the insolvency of a company as to the insolvency of an individual.]

This question as to set-off was the only one which either side came prepared to argue; the plaintiffs were willing to let the defendants pay their debt in full and prove for their cross demand. The decision of the Lord Chief Justice, which was a surprise to both parties, takes away the defendants' right of proof. Now if s. 10 of the Judicature Act, 1875, imports the Bankruptcy Rules, *Peat* v. *Jones* (4) gives the defendants all they want. It has been contended that the object of s. 10 was only to do away with the rule in *Kellock's Case* (5), which applied the doctrine of *Mason* v. *Bogg* (6) in winding-up. That view reduces to silence many of the words in the section. The words "the same rules shall prevail as to debts and liabilities provable" must include a rule which provides that the balance only shall be proved for. Bacon, V.C., in *Campbell's Case* (2), thought that the section imported set-off. A narrow view was taken in the *Albion Steel*

(1) 4 P. D. 157.
(2) 4 Ch. D. 470, 475.
(3) 16 Ch. D. 337.
(4) 8 Q. B. D. 147.
(5) Law Rep. 3 Ch. 769.
(6) 2 M. & C. 443.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

and Wire Co. (1), but that was not followed in *In re Association of Land Financiers* (2); and *In re Printing and Numerical Registering Co.* (3), and *In re Richards & Co.* (4), favour a more extended view of the section. *In re Withernsea Brickworks* (5), having gone on a special ground, is not against the defendants.

[JESSEL, M.R. It is not in their favour.]

Perhaps not, but it went on the ground that the question was not how were the assets to be administered, but what were the assets; and there is no such question here. The defendants' view is the reasonable one. Suppose a pauper has a claim for unliquidated damages against the company and owes it a large liquidated debt, is he to prove for the whole amount of his unliquidated damages and say to the company "sue me, and recover if you can?" *In re Northern Counties of England Fire Insurance Co.* (6) establishes that owing to s. 10 whatever is provable in bankruptcy is provable in winding-up. Now as regards provable debts the rule of set-off was always applied in winding-up: *Re Progress Insurance Co.* (7)

[JESSEL, M.R. The practice certainly was so settled, but how did it arise?]

It is presumed that the Court adopted it by analogy to the rule in bankruptcy, and, if so, why should it not be introduced as to unliquidated damages. The latest case on the section is *In re Hopkins.* (8)

[JESSEL, M.R. That related to a rule of proof.]

At all events the case shews that the operation of the section is not confined to doing away with *Kellock's Case.* (9) The words of the section are wide enough to cover the present case, and it is just and equitable that there should be a set-off. Moreover, Order XIX., rule 3, gives the defendants what they want. It may be only a rule of procedure, but still it must be followed out to its consequences, and rules of procedure often give important rights. The statutes of set-off may be called only statutes as to

(1) 7 Ch. D. 547.
(2) 16 Ch. D. 373.
(3) 8 Ch. D. 535.
(4) 11 Ch. D. 676.
(5) 16 Ch. D. 337.
(6) 17 Ch. D. 337.
(7) 22 L. T. 430; 18 W. R. 722; 39 L. J. (Ch.) 496.
(8) 18 Ch. D. 370.
(9) Law Rep. 3 Ch. 769.

procedure; they enabled claims to be set-off before judgment which, if they had both ripened into judgments, would have been set-off.

Charles Russell, Q.C., and *French*, for the plaintiffs. On the 15th of February, 1881, when the winding-up order was made, there was no pretence for a counter-claim. The defendants refused to pay money presently payable, on the ground that there might afterwards be a breach for which they might claim damages. In their letter of the 17th of February they impose a condition which they had no right to impose.

[JESSEL, M.R. I do not see anything like a refusal to go on with the contract.]

The letter of the 17th was a refusal to pay what was due, and if a writ had then issued there would have been no defence. There was a substantial breach of the agreement, and the defendants were told that it would be treated as such. What is the effect? According to the old authorities any refusal to deliver or pay would entitle the other party to refuse to go on. The current of authority has changed, and now the Courts are inclined to confine this to the case where the refusal goes to the whole of the contract. Here the refusal did go to the whole. *Withers* v. *Reynold* (1), a case of great authority, is very similar to the present.

[JESSEL, M.R. In that case there was an express refusal to abide by the terms of the contract.]

Hoare v. *Rennie* (2) supports the plaintiffs' case, and was approved in *Honck* v. *Muller*. (3)]

[JESSEL, M.R. It has been disapproved by several judges.

BOWEN, L.J. Is not the question more one of fact than of law?]

That is the true view, and the question is whether there is not such a refusal to abide by a material term of the contract as ought to be treated as a refusal to perform the contract. The defendants appear to have delayed payment in order to get up a case of damage for non-delivery.

Then, under s. 87 of the Companies Act, 1862, no proceeding can be taken against a company which is being wound up, except

(1) 2 B. & Ad. 882. (2) 5 H. & N. 19. (3) 7 Q. B. D. 92.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

with the leave of the Court. Now a counter-claim is a fresh action: *Stooke* v. *Taylor*. (1)

[JESSEL, M.R. It is in the nature of a defence. A defendant sued by a company must be entitled to raise any defence without leave.]

Then is there any right of set-off? The statutory provisions apart from the Judicature Act are Bankruptcy Act, 1869, s. 39; Companies Act, 1862, s. 101. The 85th section of the Companies Act enables the Court to stay all proceedings in any pending action against the company, and the 87th prohibits the institution of any fresh action without leave. There is no right of set-off unless s. 10 of the Judicature Act, 1875, or the orders under the Act, give it. Sect. 10 cannot have that effect.

[JESSEL, M.R. If a man comes to prove for damages you would deduct a debt due from him; why should not the converse hold?]

The clause only relates to proof of debts.

[JESSEL, M.R. *Peat* v. *Jones* (2) is an authority that the bankruptcy principle of set-off is to be applied in an action.]

The authorities shew that a limited construction is to be put on s. 10. *In re Withernsea Brickworks* (3); *Lee* v. *Nuttall* (4); *Thomas* v. *Patent Lionite Co.* (5); *Smith* v. *Morgan* (6); *Ex parte Railway Steel and Plant Co.* (7); *In re Richards & Co.* (8) The case of *Sankey Brook Coal Co.* v. *Marsh* (9) is against the set-off. Companies are governed by a special code of laws from which provisions as to mutual credit were designedly excluded. The wording of sect. 10 of the Judicature Act, 1875, will not bear the meaning of making a creditor of this kind a secured creditor. The section does not take away a security from a creditor, and it cannot be held to give him one. The general principle is laid down by *Pellas* v. *Neptune Marine Insurance Co.* (10) that the rules under the Judicature Acts are rules of procedure not intended to alter the rights of parties.

(1) 5 Q. B. D. 569.
(2) 8 Q. B. D. 147.
(3) 16 Ch. D. 337.
(4) 12 Ch. D. 61.
(5) 17 Ch. D. 250.
(6) 5 C. P. D. 337.
(7) 8 Ch. D. 183.
(8) 11 Ch. D. 676.
(9) Law Rep. 6 Ex. 185.
(10) 5 C. P. D. 34.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Bigham, in reply, referred to the observations of Lord Selborne on set-off in bankruptcy: *Ex parte Barnett.* (1)

JESSEL, M.R. This appeal raises two points, one of which is of very great importance. The first question is what is the rule which is to prevail as regards the getting rid of the liability to the further performance, or to the performance, of a contract in consequence of the acts or defaults of the other party in respect of that contract. If one party breaks a contract is the other party bound to perform his part of it or not? There is no absolute rule which can be laid down in express terms as to whether a breach of contract on the one side has exonerated the other from performance of his part of the contract. But I think the rule of law is properly stated in *Freeth* v. *Burr* (2), and it is stated in a very few words by the judge from whose decision this appeal comes. He says, "I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them; but I think it may be taken that the fair result of them is as I have stated, namely, that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." That makes it a question of evidence; you must consider the nature of the breach, the circumstances under which the breach occurred, and then see whether that is the result of it. There may, indeed, be a case where one party says in so many words that he does not intend to go on with the contract, but generally you must infer the intention from the acts of the parties. Then he goes on: "Now non-payment on the one hand or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free." If you have the act so done on the one side, the other party, if he elects to be free, is no longer liable to perform his part of the contract. Now, in *Freeth* v. *Burr* (2) and the other cases on the subject, no such distinction is taken as is referred to by Lord Bramwell, if I rightly read his judgment, in *Honck* v. *Muller* (3) between the case of a contract partly performed and a contract never performed at all. In *Freeth*

(1) Law Rep. 9 Ch. 293. (2) Law Rep. 9 C. P. 208.
(3) 7 Q. B. D. 92.

1882

MERSEY STEEL AND IRON COMPANY. v. NAYLOR.

Jessel, M.R.

v. *Burr* (1) there had been part performance. In the case of the *Phœnix Bessemer Steel Co.* (2) the point was not argued. That was an action founded on a contract for selling goods on credit. The vendors had said: "We will not sell you the goods any more except for cash." The other side said: "But we are entitled to credit, and if you will not sell them to us, except for cash, we will not take them at all, and there shall be an end of it." The only point argued was whether the persons who were entitled to the credit were insolvent in such a way, and to such an extent, that the vendors had a right to say "we will not sell except for cash." That was the only point argued. Nobody argued that upon the refusal of the vendors to sell without cash, and when the answer is "we must decline to take the iron," the vendors were released from the contract. I held that they were not when the case came originally before me at the Rolls, and the Court of Appeal affirmed that decision. That was the case of a contract which had been part performed to a very considerable extent. So, again, in *Withers* v. *Reynolds* (3) the contract had been partly performed. The notion, therefore, that there is any difference in this respect between a contract part performed and a contract not performed at all, is not, I think, well founded. I am not sure that I am right in supposing that Lord Bramwell in *Honck* v. *Muller* (4) intended to say that, in no case where the contract was part performed, could one party rely on the refusal of the other to go on, although that seems to me to be the fair construction of his judgment. Again, in *Simpson* v. *Crippin* (5) no such distinction was taken. *Hoare* v. *Rennie* (6) was on demurrer, which the judges seem to have forgotten, and to have treated it as a special case, and drawn inferences of fact.

That being so, the only point we have to consider is, whether the evidence in this case ought to lead us to the conclusion that the buyers refused to go on with the contract? I think the evidence is very strong, that the buyers were both ready and willing to pay if it had not been for the unlucky circumstance that induced them to refuse to pay under a mistake of law. They ought,

(1) Law Rep. 9 C. P. 208.
(2) 4 Ch. D. 108.
(3) 2 B. & Ad. 882.
(4) 7 Q. B. D. 92.
(5) Law Rep. 8 Q. B. 14.
(6) 5 H. & N. 19.

no doubt, to have paid within three days after the delivery of the ship's documents, and there was a payment under that arrangement which became due on the 5th of February. When the 5th of February arrived, the buyers had information that a petition for winding up this limited company, who were the sellers, had been presented, and they inquired whether it had been presented. The answer was that it had. They then took legal advice. Their solicitor, as occurs sometimes with the most eminent members of the profession, and must occasionally occur with solicitors, gave them advice which was not right in law. He told them that the petition for winding-up having been presented they could not safely pay the company for what was delivered. What did they do? They transmitted a copy of the letter of the solicitor to the vendors (I am giving the effect of the correspondence without going into detail) and said, "We are advised that if you get an order from the Court of the County Palatine authorizing the payment to the company we shall be safe. Apply for the order which you will get as a matter of course, and then we will pay you." They would have been safe without such an order, and certainly would have been safe with it. I am not so sure that it could have been obtained, because the Court would probably have refused it on the ground that it was not wanted. However, if it had been applied for, the decision would have done all that was required. So the matter went on. The company did not apply for the order, they took no step, but they gave the purchasers a notice that if they did not pay they would treat the contract as at an end. They, no doubt, were desirous of treating it as at an end, because the iron was worth more than the price fixed by the contract. The petition came on to be heard, and a winding-up order was made on the 15th of February, and a liquidator was appointed. The liquidator could have received payment, and could have gone on with the delivery of iron, but difficulties arose, and it was not until the 24th of February that he got an order to carry on the business of the company. The purchasers in the meantime, on the 17th of February, wrote a letter to the advisers of the liquidator, saying in effect, "We have a claim for damages for non-delivery in January, we will take either of two courses; we will either pay you the money if you put it to a separate account,

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Jessel, M.R.

and hold it as against our claim for damages, or we will waive the claim for damages, if you will make the January deliveries now and go on with your deliveries." That was not to my mind a refusal to go on with the contract. It was pointing out a mode of going on with it. The liquidator accepted neither course. He said, "As you will not pay I will not deliver," and thereupon, on the 28th of February, he is formally asked for delivery, and on the 1st of March he formally refuses.

Now, looking at these circumstances it seems to me that so far from their affording evidence of any desire on the part of the purchasers to put an end to the contract, it is clear that they wished the contract to go on, and the deliveries to continue. It is not suggested for a moment that this well-known firm were in any pecuniary difficulty, or wished to delay payment because it was not convenient to pay. Another suggestion was made in the course of the argument, but it appears to me also devoid of foundation. That suggestion was that the defendants wished to avoid payment so as to get up a case for damages on the ground of non-delivery. I think the answer to that is a very simple one, that they offered to pay, and to waive the claim for damages if the deliveries were continued. There is nothing, as I read the correspondence, which can be fairly construed into a refusal by the purchasers to comply with the terms of the contract. That being so, I think, subject to the question as to the effect of the winding up, the defendants ought to succeed.

The question depending on the winding-up is one of very considerable difficulty, because the legislative enactments on the subject are obscure. But I cannot accept the argument that, because the enactments are not perfectly plain, we are not to do our utmost to find out their meaning, and that there is to be no alteration in the law unless it is made in such clear and unambiguous terms that there can be no argument upon it. It is the duty of the Court to find out what the meaning of the legislature is; and to attach a rational and beneficial meaning, if possible, rather than an irrational and an injurious meaning, to the statutes which have been passed by the legislature.

Now, in reason there cannot be any question whatever that the right to set-off unliquidated damages against a debt is one which

ought to be supported. Irrespective of winding-up, the present defendants would have had a right to say: "You owe us a large sum of money for damages; you sold us iron at a price which, if delivered, would have left us a very handsome profit; we have lost that by your non-delivery of part, set that off against what we owe you for the portion you have delivered." In reason there is nothing to be said against this. In law there is nothing to be said against it, independently of winding-up, because, as the law now stands, whatever the law was formerly, they could have pleaded as they did plead, by way of set-off, the amount of unliquidated damages against the claim for the goods delivered. Then does the winding-up prevent that? In other words, has the liquidator the right by reason of the winding-up of a company to claim payment in full for the goods sold and delivered, leaving the purchasers to prove for their damages, and get perhaps a small dividend in the winding-up proceedings.

Now, in considering whether this can be done or not, we of course must not allow our own notion of what is right and wrong, or what is reasonable and unreasonable, to prevail, unless there is some statutory enactment upon which we can found our decision as to there being a right of set-off. I cannot say that such a right is given by the Companies Act, 1862, because the legislature, perhaps by accident, has not inserted in that statute the mutual credit section which is to be found in the Bankruptcy Act; and, though it enables a party to prove for unliquidated damages, it does not say that an account shall be taken as is done in the Bankruptcy Court, the balance ascertained, and proof or payment directed accordingly. But the legislature, by the 25th section of the Judicature Act of 1873, as amended by the 10th section of the Act of 1875, has amended the law. In construing the 10th section we must refer to the 25th section of the Act of 1873, at the time of the passing of which it was proposed to unite the Court of Bankruptcy with the other courts, an alteration which I still hope to see made, although the legislature by the Act of 1875 has not carried it out. The 25th section, after reciting that, "It is expedient to take occasion of the union of the several courts whose jurisdiction is hereby transferred to the High Court of Justice" (which, as I said before, included the Bankruptcy Court)

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Jessel, M.R.

"to amend and declare the law to be hereafter administered in England as to the matters next hereinafter mentioned," goes on to provide (inter alia) that, "In the administration by the Court of the assets of any person who may die after the passing of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudicated bankrupt." It has been suggested that those words are to be limited to doing away with the rule of *Mason* v. *Bogy* (1), that a secured creditor could in Chancery prove in full without deducting the value of his security, which he could not do in bankruptcy; but I cannot read the enactment in this limited way, for it does not merely say, "as to the respective rights of secured and unsecured creditors," but goes on to say, "and as to debts and liabilities provable," which must mean as to what debts and liabilities can be proved, and the manner in which they are to be proved. As to what can be proved the Act does not alter the law in any way material for the present purpose, for you could always prove against a dead man's estate for damages for breach of contract, though the mode of proof was different.

When we come to the Act of 1875 we find the same enactment as that which I have read from the Act of 1873, with this distinction only, that the winding-up of companies, having been forgotten in the Act of 1873, is provided for in the Act of 1875, by inserting in the 1st sub-section of s. 25 of the former Act these words, "and in the winding-up of any company under the Companies Act, 1862 and 1867, whose assets may prove to be insufficient for the payment of the debts and liabilities and the costs of winding-up." That being so, the mode of proof under the Companies Act, 1862, for unliquidated damages is to be the same as in bankruptcy. What was the mode of proof in bankruptcy? If a man comes to prove in bankruptcy for a debt, or for a liability in respect of damages for a breach of contract, an

(1) 2 M. & C. 443.

account is to be taken on both sides, and if a surplus is found due to the claimant after deducting what is found due from the claimant to the bankrupt, whether for debt or damages, he is allowed to prove for that surplus. That was the rule as to proving in bankruptcy, and consequently after the passing of the Act of 1875 the rule in the winding-up of companies is the same. It is plain, then, to my mind, that if these defendants had come to prove for damages in the winding-up, they must have deducted from their claim for damages the amount of the debt due from them to the company.

The present case, however, is not one of proof in a winding-up, but of set-off in an action, and we must look at the terms of Order XIX., rule 3. Had it not been for s. 10 in the Act of 1875, I should have felt very considerable difficulty in saying that the rule in question had effected such a substantial alteration in the law, as distinguished from alteration in procedure, as would be involved in giving this right of set-off. I should have felt that difficulty for two reasons. First of all, as a general rule, when you have provisions for altering the rules of pleading or procedure (and this order is headed "pleading generally") you do not expect to find substantial alterations of the law and of the rights of parties, but merely alterations in the mode of asserting or defending those rights. In the next place, we find these words at the end of the rule: "But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." It can hardly have meant that the judge should have a discretionary power of altering the rights of the parties, and those words furnish an argument for saying that the rule does not effect any alteration in the substantial rights of the parties. The rule provides that "The defendant in an action may set-off or set up by way of counter-claim, &c. &c., any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both in the original and on the cross-claim." The con-

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Jessel, M.R.

cluding words shew that the object of the rule was to enable the Court to do that in one action which would otherwise require two. That being so, it seems to me that, if according to the rule, there is in a case of proof to be a set-off, then there ought to be a set-off in an action, and this rule points out the mode of doing it. Again, I think, that even independently of Order XIX. a reason can be found for allowing set-off in an action, on the ground taken in *Peat* v. *Jones*. (1) Judges had said that the assignee in bankruptcy, as he was then called, was not to be in a better position by bringing an action than if the claim had been made in the Bankruptcy Court. True, the Act of Parliament only says that when the claimant comes to prove in bankruptcy, an account is to be taken. But the Courts take the meaning of the Act to be that when one of the parties is a bankrupt an account shall be taken between the parties, and that, whether the other party brings his claim into the Court of Bankruptcy or not, there shall be no claim except for the balance. This has been termed, I think, in one of these cases, the equity of the statute. That being the law, the mode of carrying it out is an accident. If when there are cross demands between the bankrupt and another party the assignee brings an action, we should allow the other party the same benefit as he would have obtained if he had come in to establish his claim in the Court of Bankruptcy. According to *Peat* v. *Jones* (1), where you see that the statute enacts that in the case of winding-up there is to be a particular mode of taking an account between the parties, and if the balance is one way the creditor shall prove in the winding-up, and that if it is the other way the liquidator shall be entitled only to claim the difference, the same mode of taking the account ought to apply to a different form of procedure whether in the Court of Bankruptcy or in the High Court. Then Order XIX., rule 3 comes in, and shews how the point is to be taken, viz., by counter-claim.

It appears to me, therefore, that if we endeavour to apply the enactments of the legislature fairly, and in a rational and beneficial manner, justice can be done by giving the defendants what they ask, viz., the right to a defence to the extent of the amount of the damages.

(1) 8 Q. B. D. 147.

LINDLEY, L.J. I am also of opinion that the judgment of Lord Coleridge in this case cannot be supported. The first question is, whether the defendants are entitled, apart from any question of set-off, to any damages by reason of the breach by the plaintiffs of a contract on their part. Lord Coleridge held that they were not, on the ground that there had been such a refusal to perform the contract as to amount to a rescission of it. Whether there was such a refusal depends entirely on the correspondence. The view which the Lord Chief Justice took of it is stated in these words: "Here the defendants, while insisting on future deliveries, positively refused to pay for the iron already delivered, and for all which might subsequently be delivered, unless the plaintiffs fulfilled a condition which the defendants in my opinion had no right to impose."

Now, without pausing to remark on the terms in which that conclusion is expressed, I confess it appears to me that the correspondence does not bear that interpretation. The alleged refusal arose in this way. It appears that the advisers of the defendant company took a view which was untenable, that is to say, they took the view that the defendants could not properly pay certain money which they owed to the plaintiff company, by reason of the pendency of the petition to wind up the company. This view was taken under the impression that there was something in s. 153 of the Companies Act, of 1862, which rendered such a payment improper. It was overlooked that s. 153 applies to dispositions by the company of its property, and not to payments to the company. The distinction is obvious, and not only obvious in the language of s. 153, but there is a case *In re Barned's Banking Company, Ex parte The Contract Corporation* (1), in which it was held by Lord Cairns that a transfer of shares to a company which was being wound up was not within s. 153, and exposed the company to calls with respect to the shares. The advice therefore was mistaken advice. However it was given, and the consequence of that advice was that the defendants declined, or refused, I will use that word for the moment, to pay what they owed. But they did not so decline or refuse as to warrant the inference which, according to the case of *Freeth* v. *Burr* (2), is necessary to dis-

(1) Law Rep. 3 Ch. 105. (2) Law Rep. 9 C. P. 208.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Lindley, L.J.

entitle them from insisting on the contract, the inference, I mean, that they abandoned the contract or repudiated it, and would not go on with it. The inference is quite the other way. The true inference to be drawn from the correspondence is that they were ready enough to pay, but felt embarrassed, and did not know how to pay. Whether they ought to have been embarrassed is quite another matter. Acting honestly, and having got the advice which they did, they felt embarrassed and hesitated about paying. It was not such a refusal to pay as brings the case at all within the principle of *Freeth* v. *Burr*. (1)

Now, I certainly do not pretend to reconcile all the cases on this subject. I have tried in vain to reconcile *Hoare* v. *Rennie* (2), *Simpson* v. *Crippin* (3), and *Honck* v. *Muller*. (4) I can understand each case by itself, but there is very considerable difficulty in reconciling them. It is not, however, necessary to do that; what we have to do is to extract from the cases some intelligible principle by which to be guided, and it appears to me that the principle is stated accurately in *Freeth* v. *Burr* (1), by Lord Coleridge himself in delivering his judgment in that case. What he says as to the result of the cases is "The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract." I think that is the fair way of testing each of these cases, and it appears to me that Lord Coleridge either lost sight of that in deciding this case or drew an incorrect inference from the correspondence. Taking that as the true test, it appears to me, that the true and fair construction of the important letters of the 10th of February, the 17th of February, and the 1st of March, is this, that the defendants refused, or declined, or hesitated, to pay, not as is stated in *Freeth* v. *Burr* (1) "evincing an intention no longer to be bound by the contract," but evincing a difficulty suggested to them by their solicitor; a difficulty which they did not see their way to get out of. I believe that is the true construction and true effect of these letters. Therefore, upon this point, which is the only point upon which the Lord Chief Justice decided this case, I am unable to agree with him.

(1) Law Rep. 9 C. P. 208.
(2) 5 H. & N. 19.
(3) Law Rep. 8 Q. B. 14.
(4) 7 Q. B. D. 92.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Lindley, L.J.

Then there remains another point which is of a totally different character. This is an action brought by a company which is now being wound up, and was commenced by leave of the judge to whose Court the winding up proceedings were attached. It is contended that in an action of this kind, a defendant is not at liberty to plead by way set-off or counter-claim a demand for unliquidated damages, even although he restricts the demand to the amount sought to be recovered by the plaintiff in the action. That raises a very important and difficult question. Let us first consider how the case would stand if the company were not being wound up. Under those circumstances I apprehend that Order XIX., rule 3, would apply. It applies to actions by companies as well as to actions by individuals, and under the Judicature Act it appears to me that there is no difficulty at all in asserting a counter-claim even to a greater extent than the amount claimed by the plaintiff. The question is, what difference it makes that the plaintiff company is being wound up.

Now, with regard to set-off, it has long been established that when a company is being wound up, whether an action is brought by a company, or a proof is carried in by a creditor of the company in the winding up, a set-off of a liquidated sum was admissible. Whether this conclusion was arrived at under the general statutes of set-off or otherwise, it is not, perhaps necessary now to consider. The importance of bearing it in mind is this, that there is nothing in the Companies Act, 1862, which expressly relates to set-off as between a company on the one hand and non-contributories on the other. There are sections in the Act which relate to set-off as between a company on the one hand and contributories on the other, and, speaking roughly, such a set-off is not allowed in the case of an action or claim between limited companies and contributories, and is allowed between unlimited companies and contributories. But there is no enactment expressly relating to set-off between companies on the one hand and non-members on the other. At the same time there is in the same Act of 1862 a series of provisions, which shews that one of the primary objects of winding up a company is to get a rateable distribution of its assets among its creditors, so that one may not be preferred to another. Notwithstanding those general

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

Lindley, L.J.

sections it was held in the year 1866 in *Anderson's Case* (1), that a set-off was to be allowed in the case of companies, either in an action or winding up proceeding, and that has ever since been the practice. Another illustration of the same kind is to be found in the case of *Ex parte James* (2), and I have never heard it in any way questioned or disputed. That, however, may have been by analogy to the statute of George II. relating to set-off which did not apply to unliquidated damages.

Then we come to unliquidated damages. In considering the case of unliquidated damages it is important to bear in mind that they can be proved in a winding-up. Sect. 158 of the Companies Act, 1862, is very wide, and I can hardly conceive any claim against a company which can result in damages which cannot be made the subject of proof. That is important, but I am not aware of any decision before the Judicature Act that throws light upon the question whether a cross-claim for unliquidated damages could or could not be set-off under the winding-up proceedings.

Now we come to s. 10 of the Judicature Act, 1875, which is very important. It is well-known that there were difficulties in the administration of assets, particularly as regards secured creditors, and that the rules in Chancery, which applied to the winding up of companies and the administration of the assets of deceased persons, were different from those in bankruptcy. This led to the insertion in the Act of 1873 of a clause which has been modified by the 10th section of the Act of 1875, so as to be applicable to the winding-up of companies. Sect. 10 of the Act of 1875 read shortly enacts that on the winding-up of any company under the Acts of 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of the secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. The first part of the section relates to secured and unsecured creditors, and alters the law laid down in *Kellock's*

(1) Law Rep. 3 Eq. 337. (2) Law Rep. 8 Eq. 225.

Case. (1) The part as to debts and liabilities provable is that which bears on the present case. To what extent does that go? I do not know the history of the introduction of those words, or what they were put in to meet, but why are we to cut them down? If we read them literally they will introduce in the winding up of companies, the same rules as to the debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy. It appears to me there is no sufficient reason for cutting the words down, and that there is a very good reason for giving them their literal meaning, and applying them to this case in furtherance of the apparent object of the section. Now, in conjunction with that section, I think we ought to take Order XIX., rule 3, because that rule in terms applies to actions between companies as well as to actions between individuals, and when we are asked to cut down that rule, it is important to observe what has been done by the legislature by s. 10 of the Act of 1875. It appears to me that the Act of Parliament and the Order throw light on each other, and that, although, there would be a difficulty (to my mind an insuperable difficulty) in applying Order XIX., rule 3, to this case, if it were not for the 10th section, yet when they are taken together the difficulties vanish, and the result of giving effect to both s. 10 and Order XIX., rule 3, is that a counter-claim for unliquidated damages ought to be allowed in the case of a company whose affairs are being wound up. That appears to me to be the logical conclusion to be drawn from the section and the rule together. Now there is, I think, no authority against that view. The decision of Williams, J., in the case of *Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.* (2) does not apply. That case was decided upon the principle that the goods supplied by the liquidator were supplied in performance of a distinct contract with him; and, of course, a liquidator selling the goods of a company would not sell them to a man who would pay the price by set-off. The case referred to of *Sankey Brook Co.* v. *Marsh* (3) was a case of a similar description. It appears to me upon the

(1) Law Rep. 3 Ch. 769. (2) 8 Q. B. D. 179.
(3) Law Rep. 6 Ex. 185.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR.

whole that the right of set-off is established, and that the appeal ought to be allowed.

BOWEN, L.J. I am of the same opinion. With regard to the first point whether the plaintiffs were justified here in refusing to deliver further, and in treating the contract as determined by reason of the non-payment and the conduct of the defendants, I desire to say that I think the true test is the one laid down in *Freeth* v. *Burr*. (1) Nor do I understand that the Lord Chief Justice really desired to depart from the principle which is to be found in the judgment of that case, a judgment which was delivered by himself. I think there has been a mistake in the shorthand notes of his judgment in the present instance, and that he did not mean to say that the test was whether the conduct of one party to the contract was inconsistent with the contract, because of course every breach of contract is inconsistent with the contract, but that the test was whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract. Now in cases where the Court has to determine whether that principle of law applies, the facts may approach nearer to the line, or may be at a greater distance from it; and the difficulty is that the judges have had to draw inferences from the particular facts in order to determine whether the principle applies. Non-delivery of a single parcel would not be necessarily, of course, sufficient to intimate that the person who does not deliver intends no longer to be bound, but I am far from saying that non-delivery of a single parcel might not in particular contracts, and under particular circumstances, be sufficient. So as to non-payment. Non-payment of itself is certainly not necessarily evidence of an intention no longer to be bound by the contract, but I do not say there might not be circumstances under which the Court would be entitled to draw that inference from it. If Lord Bramwell in *Honck* v. *Muller* (2) is to be understood as saying that the doctrine can no longer be applied when the contract has been part performed, it seems to me that his obsertion goes beyond what can be supported, for, as the Master of the Rolls has pointed out, many of the cases where one party was

(1) Law Rep. 9 C. P. 208. (2) 7 Q. B. D. 92.

allowed to treat the conduct of the other as putting an end to the contract, were cases in which the contract had been part performed. A fallacy may possibly lurk in the use of the word "rescission." It is perfectly true that a contract, as it is made by the joint will of two parties, can only be rescinded by the joint will of the two parties, but we are dealing here, not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it.

With regard to *Hoare* v. *Rennie* (1), I think that the true explanation of that case is that the plea was a special plea, which set out various facts from which two different inferences might quite well be drawn, and as one or the other is drawn, the decision would appear correct or the reverse. Upon the first point in the case, I agree with the Master of the Rolls and Lindley, L.J., in thinking that the correspondence in this case does not shew such a refusal on the part of the defendants to be bound in future by the contract as entitled the plaintiffs to consider the contract at an end.

With regard to the question of set-off, it seems to me that s. 10 of the Judicature Act of 1875 is decisive in favour of the defendants. Here is a claim which is provable, and the section says that the rules in bankruptcy as to debts and liabilities provable shall be observed and prevail in winding-up. That shews that in winding-up the claim could be set-off. But if that be so, the decision of the Court of Appeal in *Peat* v. *Jones* (2) appears to me sufficient, even without Order XIX., rule 3, to enable the defendants to set up this defence in an action. If it were not for s. 10, I agree with Lindley, L.J., and I believe with the Master of the Rolls, in thinking it very doubtful whether Order XIX., rule 3, which I think is a mere procedure rule, would be sufficient. But no difficulty arises when s. 10 is taken into account, for then Order XIX., rule 3, is only taken as indicating the proper way of setting up, or bringing to the notice of the Court, the rights of the parties which have been established by s. 10. For these reasons I think the judgment of Lord Coleridge cannot be supported.

(1) 5 H. & N. 19. (2) 8 Q. B. D. 147.

1882

MERSEY STEEL AND IRON COMPANY v. NAYLOR,

Bowen, J. J.

MINUTES OF ORDER.—Discharge the judgment. Declare that the defendants are entitled to set-off against the 1713*l.* admitted to be due to the plaintiffs such damages as they the defendants may have sustained by reason of the failure or refusal of the plaintiffs to deliver to the defendants the remainder of the blooms deliverable under the contract. Reference to ascertain the amount of such damages. Order the plaintiffs to pay the defendants' costs of the appeal. Reserve further consideration, and the costs of the action to follow the event.

Solicitors for plaintiffs: *W. W. Wynne & Son.*
Solicitor for defendants: *G. M. Clement.*

H. C. J.

June 19.

[IN THE COURT OF APPEAL.]

QUILTER *v.* MAPLESON.

Landlord and Tenant—Relief against Forfeiture—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14—*Pending Proceedings—Order LVIII. r.* 5—*Power of Court of Appeal.*

A landlord brought an action to recover the demised property under a proviso of re-entry for breach of a covenant to insure. The defendant claimed relief under statute 22 & 23 Vict. c. 35, s. 4. The plaintiff obtained judgment on the 4th of July, 1881. On the 4th of August the defendant appealed. A stay of proceedings was granted and continued, so that the plaintiff never obtained possession. On the 1st of January, 1882, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), came into operation, after which the appeal came on to be heard.

Held, that the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 2, is not confined to breaches taking place after the Act came into operation, but extends also to breaches committed before the Act, and to proceedings pending when the Act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that sub-section.

Held, also, that assuming the judgment of the Court below to have been correct according to the law as it then stood, the Court of Appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, since the general orders provide that appeals shall be by way of re-hearing, and give power to the Court of Appeal not merely to make any order which ought to have been made by the Court below, but to make such further or other order as the case may require.

THE plaintiff was the assignee of the lessors in an indenture of lease dated the 10th of July, 1845, by which Her Majesty's

1882

QUILTER v. MAPLESON.

Theatre, Haymarket, was underlet to B. Lumley, and the defendant was the assignee of Lumley. The action was commenced in May, 1880, to recover possession under a proviso of re-entry for breaches of covenant. The breaches alleged were that the defendant had omitted to keep the premises insured against fire for 14,000*l.* in the names of the persons mentioned in the covenant for insurance; had neglected, omitted, or refused to produce to the plaintiff or his agents when requested to do so on the 4th and 6th of May, 1880, the policies and the receipts and vouchers proving the payment of the premiums; and had not paid the premiums and policies for keeping the premises insured.

The defendant by his statement of defence claimed relief under 22 & 23 Vict. c. 35, s. 4, alleging that the breach of the covenant to insure had been committed without fraud or gross negligence.

The defendant, it appeared, had been abroad in March, 1880, when the policies of insurance expired, and had left instructions with an agent to keep the policies on foot, but had not remitted funds for doing so. The agent entered into an arrangement with the agents of the insurance companies for keeping the policies on foot till the defendant returned to England, but it was disputed whether this arrangement would in the event of a fire have been binding on the companies if they had chosen to repudiate it. The property had since been duly insured.

The action was tried before Lord Coleridge, C.J., who on the 4th of July, 1881, gave judgment for the plaintiff, but granted a stay of proceedings which had subsequently been continued, so that the plaintiff never obtained possession.

The defendant on the 4th of August, 1881, gave notice of appeal.

On the 1st of January, 1882, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), came into operation.

On the 19th of June, 1882, the appeal came on for hearing.

Sir Farrer Herschell, S.G., E. Harrison, Q.C., and *Harmsworth*, for the appellant. The Lord Chief Justice decided against the defendant on the ground that there had been negligence. The statute 22 & 23 Vict. c. 35 says "gross negligence," which must mean something more than "negligence," and his Lordship did not

1882

QUILTER v. MAPLESON.

say that there had been gross negligence. But supposing that there was gross negligence, so that the defendant was not entitled to relief under that statute, he is now entitled to relief under the Conveyancing and Law of Property Act, 1881, c. 14.

[JESSEL, M.R. How can that help you on this appeal? Can the Court do anything but decide what judgment ought to have been given in July, 1881, when that Act had not come into operation?]

If the defendant had brought an equitable action for relief against forfeiture under the Act of 1881, c. 14, sub-s. 2, instead of setting up the defence in this action, the landlord could not have resisted it, for the lessee is in time, as the landlord has not re-entered. [They were then stopped by the Court.]

Webster, Q.C., and *Greene*, contra. Sect. 14 of the Act of 1881 no doubt applies to leases made before the Act, but not to breaches before the Act. The 2nd sub-section cannot so apply, because it refers to conduct under the 1st sub-section. "Where a lessor is proceeding" means "where, after the passing of this Act, a lessor proceeds." The repealing section, s. 71, saves pending proceedings, and expressly leaves the consequences of anything done before the Act unaffected. On this appeal the Court cannot pronounce a judgment which would have been wrong if Lord Coleridge had pronounced it when the case was before him.

JESSEL, M.R. I am of opinion that the Act of 1881 applies. The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively, unless it is clear that such was the intention of the legislature. Let us first consider what was the object of this enactment. It was to give a lessee a right to relief against forfeiture which he did not previously possess. Sub-s. 9 of s. 14, expressly makes the section apply to old leases, so that sub-s. 1 clearly deprives the landlord of a right which he would have had to claim a forfeiture of an existing lease under the terms of a proviso contained in it. The section therefore manifestly is to some extent retrospective, as it alters the rights of the parties under an existing contract. We have then to consider whether it applies to a pending action. Now, first, does the Act apply to breaches committed before it

came into operation? I am of opinion that it does. It would be strange if the contract were altered as to future breaches only and not as to past breaches, and if we look at s. 71, the intention of the legislature is reasonably clear. Suppose a breach of a covenant to insure to have been committed without fraud or gross negligence before the Act of 1881 came into operation, no fire to have occurred, and a proper insurance to have been effected before the Act came into operation, but no proceedings to have been taken to obtain relief under 22 & 23 Vict. c. 35, s. 4. The Act of 1881, s. 71, repeals that enactment, and only saves to the lessee the benefit of it so far as relates to any pending proceeding. If then we were to hold the Act of 1881 not to apply to breaches committed before it came into operation, the effect of an enactment designed for the benefit of tenants would be to take away from the tenant a right to relief against forfeiture which he had before it came into operation.

Then does the enactment apply to pending proceedings? I think that it does. The second sub-section only applies where the landlord has not re-entered. This is important to be observed. On an ejectment under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, a tenant could obtain relief against forfeiture for non-payment of rent at any time within six months after execution. No such period is allowed by the Act of 1881, s. 14, sub-s. 2, and the tenant must proceed under that enactment before the landlord has re-entered. We must, therefore, in furtherance of the objects of the Act, hold the enactment to apply to pending proceedings, unless there is something in the words to prevent our doing so. Mr. Greene argued that this sub-section cannot apply to pending proceedings, because it refers to the conduct of the parties under the foregoing provisions which can only relate to matters after the Act comes into operation; but I think we must treat those words as referring to the conduct of the parties under the preceding provisions, when and so far as the previous provisions are applicable. I think, therefore, that the sub-section is applicable to pending proceedings, and that we have jurisdiction under it, unless the fact of this being an appeal prevents our having it.

Now, when we look at Order LVIII., rule 2, we find it provides hat "All appeals to the Court of Appeal shall be by way of re-

1882

QUILTER v. MAPLESON.

hearing." On an appeal strictly so called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. This point often arose in the Court of Chancery where there was no strict appeal, but only a re-hearing before a superior Court. It often happened that somebody had died before the re-hearing, which made the title of one of the parties clear—the Court on the re-hearing could have regard to that. So also the Court could have regard to conduct which made an appeal improper. Then the 5th rule of the same order gives the Court of Appeal power to admit further evidence, and says, that "The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." It was, in my opinion, intended to give appeals the character of rehearings, and to authorize the Court of Appeal to make such order as ought to be made according to the state of things at the time. I am of opinion, therefore, that the defendant is entitled to relief against the forfeiture.

LINDLEY, L.J. I also am of opinion that s. 14, sub-s. 2 of the Act of 1881 is applicable. The action was brought by the landlord on the ground of breaches committed before the Act, and he obtained judgment before the Act came into operation, but execution was stayed, so that he has never obtained possession. The original action then is not yet at an end. Now when we look at s. 14, we find that so far as language goes, the 2nd sub-section applies to the case. So long as the tenant has not been turned out of possession he is within the terms of the enactment, for the lessor is "proceeding to enforce" his right of re-entry. The enactment then being in terms retrospective must be construed according to its terms as being retrospective. The 14th section is expressly declared by sub-s. 9 to be applicable to old leases, and it manifestly alters the rights of the parties retrospectively. It is urged, however, that though it applies to leases made before the Act, it does not apply to breaches of covenant committed before the Act. It is not expressly in terms declared to apply to them, but when

we look at the object of the enactment it does not appear to me to be going beyond fair construction to say that it applies to breaches before the Act and to pending proceedings. It is not unimportant to observe that the Act under which the tenant could have obtained relief before the passing of the Act of 1881 is repealed by s. 71 of that Act, which provides that every action, proceeding, and thing then pending or incomplete, may be carried on and completed as if there had been no such repeal in the Act. Putting the provisions of the Act together, they appear to me to justify the conclusion that on the true construction the 14th section of the Act is retrospective, and applies to breaches whenever committed, so long as the landlord has not obtained possession.

BOWEN, L.J. I am of the same opinion. The first question is, whether the defendant's application for relief is too late. Under s. 14, sub-s. 2 of the Act of 1881, the tenant may apply for relief until the landlord has re-entered. Now, as long as execution is stayed, re-entry is suspended. It was urged that this sub-section does not apply to an action pending when the Act came into operation. No doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure, it does not modify the clear words of a statute. Many clauses of this statute contain provisions clearly retrospective, which lessens the presumption against any particular clause being retrospective. I agree with Mr. Webster in thinking that the words "where a lessor is proceeding" in s. 14, sub-s. 2, rather relate to the character of the proceedings than to the question when the proceedings were commenced, but I think that the provision has a retrospective force derived from sub-s. 9, and is applicable to a pending litigation. Why should the provision not be so applicable? It is expressly made applicable to leases executed before the Act, and therefore affects rights existing when the Act came into operation; why then should it be confined to breaches committed after the Act? The wider application is more consistent with the principle of the statute. If so, I think we must go further and hold that it applies to proceedings pending when the Act came into operation. Sub-s. 2 gives the Court power to impose all such terms as are

1882

QUILTER v. MAPLESON.

requisite to enable it to do justice to the landlord. The only remaining question is, whether the Court of Appeal can give relief where a judgment had been obtained by the landlord before the Act came into operation. I think we should be misreading the Judicature rules if we held that it could not when the landlord has not obtained possession. The rules were intended to enable the Court of Appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules of procedure too far to say that the Court of Appeal cannot decide according to the existing state of the law. I think that such is not the true construction of the rules, for Order LVIII. rule 5, does not merely enable the Court of Appeal to make any order which ought to have been made by the Court below, but to make such further or other order as the case may require.

Relief was accordingly granted to the defendant on the terms of his repaying to the plaintiff, with interest, the premiums of insurance which the plaintiff had paid, rent up to the 24th of June, and the costs both in the Court of Appeal and in the Court below.

Solicitors for plaintiff: *Last & Sons.*
Solicitor for defendant: *J. R. Gole.*

H. C. J.

[IN THE COURT OF APPEAL.]

1882
July 6.

PRICE AND OTHERS *v.* LIVINGSTONE AND OTHERS.

Ship—Charterparty—Final sailing from last Port.

By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom." The vessel was loaded at Penarth Dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom:—

Held, affirming the decision of Lopes, J., that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that the one-third of the freight was payable.

ON the 12th of October, 1880, the plaintiffs chartered to the defendants the ship *Buckhurst* by a charterparty on a printed form. The passages material for the present purpose are given below, the insertions in writing being distinguished by italics.

"It is this day mutually agreed between *Messrs. W. R. Price & Co.*, owners of the good ship or vessel called the *Buckhurst*, and classed 100 *A*1, of the measurement of *1850* tons or thereabouts now *building* in the Port of *Dumbarton*, and *Messrs. Livingstone, Briggs, & Co.*, merchants, that the said ship being warranted tight, staunch, and strong, and classed as above during the voyage, shall with all possible dispatch proceed to *Penarth Dock, Cardiff*, and after being in a loading berth . . . . shall there load a full and complete cargo of steam coals as ordered by charterers, which they bind themselves to ship, &c., &c., and being so loaded shall proceed to *Bombay*, or so near thereunto as she may safely get, and deliver the same, &c., &c., the act of God, the Queen's enemies, fire, and all and every other the dangers and accidents of the seas,

1882

PRICE v. LIVINGSTONE.

rivers, and navigation during the said voyage always mutually excepted. The freight to be paid on the quantity delivered at and after the rate of *twenty-one shillings and sixpence* per ton of 20 cwt., or at the option of the agent of the P. & O. Steam Navigation Company at the port of discharge on the quantity shipped . . . . such freight to be paid as follows:—An advance of *one-third* by charterers acceptance at *three* months date and *one-third at six months date* from final sailing of the vessel from her last port in United Kingdom, clean bills of lading on charterers form for the cargo having been previously signed by the master and handed to the charterers, or at their option in cash within eight days from sailing under discount at Bank rate, but not under 5*l.* per cent. per annum."

On Friday, the 14th of January, 1881, the vessel was fully loaded at Penarth Dock, and on the 15th was ready for sea. On the 16th she was towed out by a steam-tug for seven or eight miles to a point out in the Bristol channel, about three miles from Lavernock point. The weather being threatening the captain cast anchor here. The vessel remained at anchor till the 18th, when, owing to the violence of the wind, the cables parted, and she ultimately drove ashore on Penarth beach. Part of the coal was thrown overboard, the rest was wetted with sea-water, and could not be carried on to Bombay.

The vessel had never been outside the limits of the port of Cardiff as defined for fiscal purposes, but taking the port in its ordinary commercial sense she had left it and been out at sea. She ran aground within the limits of the port in the ordinary sense.

The plaintiffs brought their action to recover 1056*l.*, the amount of one-third of the freight. The defendants resisted the claim on the ground that the ship had never finally sailed from her last port in the United Kingdom. Lopes, J., gave judgment in favour of the plaintiffs.

The defendants appealed.

Hollams, for the defendants. The vessel never was outside the port of Cardiff as defined in the gazette for fiscal purposes. She cannot, therefore, be considered to have finally sailed from her last port. She was moreover driven back so as to be within the

limits of the port in a popular sense, and the words "last port" are wide enough to cover a port in the United Kingdom into which she is driven by stress of weather.

[SIR J. HANNEN referred to *Roelandts* v. *Harrison* (1) as to the limits of the port of Cardiff, and to *Hudson* v. *Bilton* (2) as to final sailing.]

A. L. Smith, contrà, was not called upon.

JESSEL, M.R. This case raises a simple point on a charterparty, which is partly in print partly in writing. [His Lordship here read the material parts of the charterparty, distinguishing the parts in print and in writing.] Stress has been laid on the words "last port," but I am not much struck by them. If only one port is mentioned it might be more correct to strike out "last" from the printed form, but if there is only one port, it must be both first and last, so I do not think that any stress is to be laid on the expression. The question then is, what is meant by sailing from the last port. The word "port" must be understood in its ordinary commercial sense. There are ports which, like the port of Cardiff, extend to miles for fiscal purposes, but they are not for commercial purposes to be treated as having that extent. This vessel was towed out to sea in the Bristol channel, and had got seven or eight miles out of the port in its ordinary commercial sense. It is urged that she was driven back to Cardiff, and so had not finally sailed. That she was driven back is, to my mind, immaterial for the present purpose. She had finally sailed as soon as she had left the port for the purpose of proceeding on her voyage without any intention of coming back. It can hardly be seriously suggested that she had not "sailed" within the meaning of the charterparty, because she was in tow and her sails were not set. What is meant by sailing is departure from the port for the purpose of proceeding on her voyage.

SIR JAMES HANNEN. The case of *Hudson* v. *Bilton* (2) suggests the meaning of "final sailing," the vessel must have got out of port ready for her voyage and for the purpose of proceeding on her voyage. It was held in that case that the vessel had not

(1) 9 Ex. 444. (2) 6 E. & B. 565.

1882

PRICE v. LIVINGSTONE.

finally sailed, because her papers were not on board. In the present case everything was ready, and the fact that the vessel was driven back by stress of weather does not entitle us to say that she had not finally sailed. It is said that she had not finally sailed from her last port, but as only one port is mentioned, last port must mean the port of Cardiff. It has been contended that, as she was driven back, the port into which she was driven was her last port, and that she never sailed from it. But this cannot have been the meaning of the charterparty, for it would leave it undetermined when the bills were to commence running until it was ascertained that she had not been driven back into any port in the United Kingdom. The port from which a vessel starts intending to go on her voyage is her last port.

LINDLEY, L.J. The question is, whether this vessel had finally sailed from her last port in the United Kingdom. Final sailing, I apprehend, means getting clear of the port for the purpose of proceeding on the voyage. Here the vessel left the port of Cardiff with no intention of going back. If a vessel goes seven or eight miles from Penarth Dock she is out of port, for she is fairly at sea. I think that no great weight is to be attached to the word "last" as it occurs in a printed form.

Appeal dismissed.

Solicitors for plaintiffs: *Parker & Co.*
Solicitors for defendants: *Hollams, Son, & Coward.*

H. C. J.

[IN THE COURT OF APPEAL.]

1882
July 6.

THE GUARDIANS OF MANSFIELD UNION *v.* WRIGHT.

Principal and Surety—Bond to Guardians for collection of Rates—Overseers.

The defendant as surety gave a bond to the guardians of the poor for the M. Union conditioned for the due discharge by C. of his duties as collector of poor rates for the parish of N. C. absconded, having embezzled part of the rates and allowed others to be lost by not applying for them. The guardians sued the defendant for the loss. The defendant admitted his liability as to the sums embezzled, but disputed his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N., had discharged their statutory duties with reasonable care the loss would not have occurred:—

Held, affirming the decision of Watkin Williams, J., that the plaintiffs were entitled to recover from the defendant the moneys lost through failure of C. to collect them, for that there had been no negligence on the part of the plaintiffs, and they were not answerable for the negligence of the overseers.

In March, 1876, the plaintiffs the guardians of the poor of the Mansfield Union, appointed J. B. Carter to be collector of the poor-rates for the parish of South Normanton.

By bond dated the 16th of May, 1876, Carter and the defendant and V. H. Radford became jointly and severally bound to the plaintiffs in the sum of 100*l.*, the condition of the bond being that Carter should faithfully and honestly perform the duties of collector of the rates, and diligently collect the rates, and duly, punctually, and correctly account for them, and from time to time pay to the person or persons entitled to receive the same, all moneys collected and received by him.

The plaintiffs by their amended statement of claim alleged that Carter appropriated to his own use moneys received by virtue of his office between April, 1877, and June, 1878, to the amount of not less than 84*l.* 9*s.* 6*d.*, that he had not diligently collected the rates, that he had absconded in February, 1879, and that in conse-

1882

GUARDIANS OF MANSFIELD UNION v. WRIGHT.

quence of his failure, rates to the amount of at least 15*l.* 10*s.* 6*d.* which he could have collected had not been received by the plaintiffs, and the plaintiffs now could not recover the same. The plaintiffs claimed 100*l.*

The defendant paid into court 84*l.* 9*s.* 6*d.*, and by his statement of defence alleged as regarded the 15*l.* 10*s.* 6*d.*, that if such damage had been sustained it was a damage which might and would have been prevented, if the plaintiffs had used ordinary diligence in collecting the rates or appointing another person to collect the same within a reasonable time after Carter's default. The defendant further alleged that the plaintiffs were guilty of laches in allowing the rate to remain uncollected, and the duties of the office of collector to remain unperformed, and the defendant pleaded that by reason of the premises, he was discharged from his suretyship in respect of such alleged damage.

The action came on for trial at Nottingham, and on the 26th of July, 1881, an order was made by consent that the jury should be discharged, and that the issues of fact should be referred to a barrister to take evidence and report to Watkin Williams, J., thereupon.

The referee reported that rates which it was Carter's duty to collect were made in April, June, and November, 1877, and February, 1878. That it appeared from the summaries at the end of the rate-book, that there remained uncollected at the time of balancing the book for April, 1877, 15*l.* 8*s.* 5*d.* recoverable arrears of that rate, at the time of balancing the book for June, 124*l.* 4*s.* 1¾*d.* recoverable arrears of that rate, and of the April rate, at the time of balancing the November book, 137*l.* 9*s.* 9*d.* recoverable arrears of that and the previous rates, and at the time of balancing the book for February, 1878, 201*l.* 7*s.* 9¼*d.*, recoverable arrears of that and the previous rates.

The referee then proceeded to find that Carter had not diligently collected the rates, and that by reason of his not doing so damage was occasioned to the extent of at least 15*l.* 10*s.* 6*d.*, as alleged by the statement of claim, and that in consequence of his neglect, rates to the amount of not less than that sum had become irrecoverable and lost to the parish.

He found that no evidence was given to shew that the attention of the plaintiffs was called to the neglect of the collector prior to a communication by the Local Government Board on the 30th of August, 1878, calling their attention to the fact that the auditor had reported unfavourably as to Carter's account. That Carter resigned his office in September, 1878, and a new collector was appointed in October, 1878. He found that the overseers before Carter's resignation left the collection of the rates to him, and did not see from time to time that he got in the arrears. That after Carter's resignation the overseers repeatedly applied to him for his books, but did not obtain them till the end of December, 1878, when he was ordered by the auditor to give them up. The referee found that up to that date the overseers were not aware that Carter had embezzled, though they knew about the time of his resignation that he had not kept his books satisfactorily. The referee further found that after the overseers had received the books they had used all reasonable diligence to collect the arrears.

WATKIN WILLIAMS, J., on further consideration held that the plaintiffs were entitled to the 15*l.* 10*s.* 6*d.*, as well as the 84*l.* 9*s.* 6*d.*, and gave judgment for the plaintiffs with costs. The defendant appealed.

Daniel, for the defendant. The guardians were in default in not taking proper care that the collector passed his accounts. A surety has a right to expect that the guardians will act according to law and discharge their duties: *Mactaggart* v. *Watson.* (1) Carter was collector to the guardians and could only collect the rates by their directions.

[JESSEL, M.R. If people made default in paying their rates it was his duty to report them and get directions. The finding is against you that the rates were lost by his default.]

Under s. 57 of the Judicature Act, 1873, and Order XXXVI., rule 34, the Court can deal with the report and with the whole matter.

[JESSEL, M.R. You are bound by s. 58; the report is equivalent to the verdict of a jury.]

(1) 10 Bli. 618, 625; 3 Cl. & F. 525.

1882

GUARDIANS OF MANSFIELD UNION v. WRIGHT.

The referee by the order of reference is to report on the evidence.

[JESSEL, M.R. No—"thereupon" refers to the issues of fact. Under s. 56 a particular question may be referred for inquiry, but that is not what was done here. The issues of fact were referred. A report under s. 56 requires confirmation, but one under s. 58 can only be set aside like a verdict on the ground that it is against the weight of evidence.]

I ask then for leave to move to set it aside as against the weight of evidence.

[JESSEL, M.R. On the present occasion you have to shew that Williams, J., was wrong on the materials before him.]

The question then is what are the duties of the guardians and overseers? The duty of the collector is to collect under their direction, and under their direction to take proceedings against defaulters. He could not take any such proceedings without their directions. If the guardians and overseers had discharged their statutory duties as prescribed by 7 & 8 Vict. c. 101, ss. 32, 33, the loss would not have occurred. The guardians are in fact suing as trustees for the overseers to whom the money is payable, and can have no greater rights than the overseers would if they were plaintiffs. The loss has arisen through their default, and the surety is discharged. The cases in which the strong expressions as to the liability of sureties have occurred were cases of embezzlement, and it was justly said that a surety makes himself responsible for the honesty of the collector.

[JESSEL, M.R., referred to the observations of Lord Brougham in *Mactaggart* v. *Watson* (1), "The error in the present case arises in supposing that any want of care on the party's side in making the trustee do that which the surety had covenanted that he should do was like a postponement of the surety's equities or diminution of his rights at law."]

Story's Equity Jurispr., s. 325, is in the defendant's favour.

[JESSEL, M.R. That is a defective statement taken from *Watts* v. *Shuttleworth* (2) abridged so as to become inaccurate.]

Strange v. *Fooks* (3) lays down that if through any neglect on

(1) 10 Bli. 622, 625.

(2) 5 H. & N. 235; 29 L. J. (Ex.) 229.

(3) 4 Giff. 408, 412.

the part of a creditor a security to the benefit of which a surety is entitled is lost or is not properly perfected, the surety is discharged, and this was cited with approbation in *Wulff* v. *Jay* (1) and other cases.

[JESSEL, M.R. The very point was decided against you by Lord Kingsdown in *Black* v. *Ottoman Bank* (2), and *Creighton* v. *Rankin* (3) is also in your way.]

That was a case of embezzlement which is quite distinct.

A. Glen, for the plaintiffs, was not called upon.

JESSEL, M.R. This is an appeal from a decision of Mr. Justice Williams in an action against a surety who had entered into a bond for the due discharge by a collector of rates of his duties as such collector. The collector embezzled some of the rates and neglected to collect others. The defendant did not dispute his liability as regarded the sums embezzled, but he insists that he is not liable as regards the sums omitted to be collected, for that the overseers ought to have looked more diligently into the proceedings of the collector. It was urged that the guardians are in fact suing on behalf of the overseers to whom the sum recovered is payable, and are therefore not entitled to any greater rights than if it was the overseers who were suing. It was urged that the overseers could not sue because the amount lost was lost by their default.

The referee states in his report facts very unfavourable to the defendant. He finds that the collector's default caused the loss of certain sums payable for rates. It is quite consistent with the report that if the collector had applied for these rates he would have received them, and even if there were reason to doubt the accuracy of the finding that they were lost owing to the neglect of the collector, which reason I do not see, we still should not be able to go behind the report.

Then, as to the right to sue, I cannot agree that the guardians are in the same position as the overseers. The people who lose if the money cannot be recovered are the other ratepayers, and the guardians sue on their behalf. The measure of damages is not

(1) Law Rep. 7 Q. B. 756, 765. (2) 8 Jur. (N.S.) 801.
(3) 7 Cl. & F. 325.

1882

GUARDIANS OF MANSFIELD UNION v. WRIGHT.

what the obligees named in the bond lose, but what is lost to the rates. I am of opinion, therefore, that the appeal fails.

I am further of opinion that it would have failed even if the overseers had been the plaintiffs. The case made by the defendant is that if the overseers had duly called on the collector to render his accounts the loss would not have occurred. But mere negligence on the part of the obligee does not discharge a surety, and the mere omission to call on the collector to account cannot exonerate the defendant.

SIR JAMES HANNEN. I shall confine myself to one point, viz., whether the guardians are affected by the alleged laches of the overseers. I am of opinion that they are not. The guardians appointed the collector, and the bond was given to them. They are not answerable for the conduct of the overseers. The report is inconsistent with the view that they were guilty of any laches. It finds that the money was lost by the default of the collector, and that it was not shewn that the guardians knew anything of his negligence till the 30th of August, and his resignation took place in the next month. The report of the referee, which stands on the same footing as the finding of a jury, is decisive against the defendant.

Whether, if the overseers had been the plaintiffs, their laches would have been a defence, is a point which we have not, in my opinion, sufficient materials to enable us to decide. It is clear that mere passive negligence on the part of the obligee does not discharge a surety. It is shewn, however, by *Watts* v. *Shuttleworth* (1), that a neglect of duty by the employer may in some circumstances be set up as a defence, and if the action had been by the overseers and it was shewn that they had neglected a duty imposed on them by statute, I think the principle of that case would have applied. I rest my judgment on this, that the guardians are not responsible for the negligence of the overseers.

LINDLEY, L.J. I am of the same opinion. The bond is given to the guardians, the action is by them, and no negligence is imputed to them. The collector was guilty of default in two

(1) 5 H. & N. 235.

1882

GUARDIANS OF MANSFIELD UNION v. WRIGHT.

respects; he embezzled some moneys and allowed others to be lost by not collecting them. It is urged that the action is in substance an action by the guardians as trustees for the overseers. I think that is a mistake, and that there is no ground for saying that nominal damages only can be given because they suffer no individual loss. They sue, in my opinion, as trustees for the parish. I do not think that the facts are sufficiently before us to enable us to form an opinion how the case would stand if the overseers had been obligees and plaintiffs, nor is it necessary for the decision of the case that we should form any opinion upon that point.

Appeal dismissed.

Solicitors for plaintiffs: *Hardisty & Rhodes.*
Solicitors for defendant: *Stevens & Co.*

H. C. J.

IN RE HULL.

Aug. 10.

Coroner—Misbehaviour in Office—Unnecessary Delay—Neglect or refusal to hold Inquest—Sudden Death without Information as to Cause—Discretion of Coroner as to holding Inquest.

A coroner is not justified in delaying the inquest upon a dead body in a state of decomposition for so long a period as five days in order that the body may be identified, and buried and registered under the right name, and the mere fact that it has been placed in a mortuary can make no difference.

A coroner received from the proper police authorities a report with a view to an inquest, that a man within his district, aged sixty-one, had been found dead in his bed. It did not appear on the one hand that there had been any previous disease or illness, or on the other hand that there was any suspicion of violence, suicide, or crime. A medical man, moreover, refused to give a certificate of the cause of death, and the friends and relatives of the deceased made no objection to an inquest:—

Held, that the coroner had, in the absence of further information as to the cause of death, no discretion to refuse to hold an inquest upon the ground that it was unnecessary.

RULE granted by the Lord Chancellor under 23 & 24 Vict. c. 116, s. 6, calling on G. W. Hull, coroner for West Surrey, to shew cause why he should not be removed from his office on the ground of misconduct.

1882

IN RE HULL.

1882. Aug. 2. *Robert Williams*, shewed cause.

Affidavits were filed on behalf of the complainants at whose instance the rule was obtained, but no one appeared in support of the rule.

The nature of the complaints against Mr. Hull, and of the argument in shewing cause, sufficiently appears in the judgment.

Cur. adv. vult.

Aug. 10. LORD SELBORNE, L.C., delivered judgment as follows: Frequent complaints have been made to myself and to my predecessor in office, during the present and former years, of alleged misconduct or neglect of duty on the part of Mr. G. W. Hull, coroner for West Surrey. Some of these complaints were investigated before me last year, on a notice to Mr. Hull to shew cause why he should not be removed from his office; and, although I did not on that occasion consider that I was bound to take so extreme a course, I intimated my disapproval of his conduct on several points, and my hope that I should never again hear of similar complaints.

Having been disappointed in that hope, I have again considered it necessary to call upon Mr. Hull to shew cause why he should not be removed from his office of coroner; and on Wednesday, the 2nd of August, 1882, I was attended by his solicitor and counsel, and the several matters of charge to which his attention had been directed were fully gone into.

I do not think it necessary now to advert in detail to more than two of those matters. Of the rest the character is uniform. They are complaints of delays (in some cases for five and in several for six days after death) in holding inquests. For these delays Mr. Hull has excused himself by the exigencies of his other necessary engagements in other parts of his district; and it was suggested by his counsel that the district was so large, and the number of occasions for inquests within it so great, as to make it impossible for any coroner, whatever diligence he might use, to avoid the frequent occurrence of inconvenient delay; that the want of easy means of communication by railway between different parts of the district frequently rendered it impracticable to appoint inquests at places remote from each other for the same day; and that the

district requires division, if all occasion for complaints of this kind is for the future to be avoided. The frequent recurrence of such complaints is to me very painful and unsatisfactory, and I hope the justices in quarter sessions (to whom a copy of my judgment in this case will be sent), will take these matters into their consideration, and will adopt such measures as may be proper, if they think the district is really too large for the duties of the coroner's office to be efficiently discharged in it by one coroner without delays which must always be distressing, and may often be injurious to the health of families. Whether it is so or not is a question of which they must necessarily be better able to judge than I am. In the meantime, I can only deal with this class of cases upon the evidence which has been actually brought before me, and while I am unable to say that Mr. Hull's explanations have removed from my mind the impression that there has been an inadequate perception on his part of the duty of holding inquests as early as possible, I cannot reject them as clearly insufficient with respect to all, or indeed any, of these particular cases.

There are two cases of a different kind. One is that of a body found drowned in the river Mole, near Dorking, on the 17th of May, 1882. On that day Mr. Hull was at Brockham in the same neighbourhood holding an inquest on another body, and he was then informed of this case. The body of the drowned man had been taken to the mortuary of a cemetery adjoining the high road from Dorking to Reigate; and it was seen on the same day by Mr. Hull, who went from Brockham to Dorking in the company of a medical gentleman named Hopcroft. He himself says that it was then in a not "highly" but "slightly," decomposed state; and it is not alleged that there would have been any difficulty in immediately holding an inquest. But Mr. Hull appointed the inquest to be held five days afterwards, on the 22nd of May. Mr. Mills, a miller of Dorking (one of the persons who have made complaints against Mr. Hull), states, in his statutory declaration, that the body, having been many days in water, was at the time when it was found "in a frightfully decomposed state." Whatever may have been then the exact stage of decomposition, Mr. Hull must have been aware that it would necessarily become

1882

IN RE HULL.

worse before the 22nd. He states that "the mortuary is lofty and well supplied with disinfectants," and that "Dr. Hopcroft said the body could remain there four or five days." Dr. Hopcroft has made no declaration, and Mr. Hull justifies the delay on a more general ground. "As is my custom," he says, "I held the inquest as late as I thought I could, as I think it always well that an opportunity should be given for the body to be identified, that the body may be buried and registered under the right names. I always do this in the London district, and I have never heard of any complaint."

Such a practice, under such circumstances, is not, in my opinion, capable of being justified by the reason assigned, or by any other. However desirable it may be that those acquainted with a person found dead may have an opportunity of identifying his body at or before the inquest, I regard it as inconsistent with a coroner's duty to suspend the holding of an inquest upon a body in a state of decomposition for that cause only, during so long a period as five days; nor does the fact of its being in a mortuary make, in my judgment, any sufficient difference, though, of course, the evil would be greater if it were in a private dwelling-house. It is old law that "if a dead body whereon an inquest ought to be taken, be interred, or suffered to putrefy, before the coroner hath viewed it, the township shall be amerced": Bac. Abr. "Coroners," C.; Staundford, P. C. 51 G.

Besides the nuisance and the indecency of keeping the body long above ground when it is in that state, the difficulty of the investigation, which is the object of an inquest must often, if not always, be thereby increased. If it is an offence against the law, under such circumstances, to delay giving notice to the coroner, I do not understand how the coroner himself can justify unnecessary delay in holding the inquest. I am unable, therefore, to come to any other conclusion than that in this instance the coroner's duty was not properly performed. Still I think that this, under all the circumstances, was not an offence of such an inexcusable kind as to make it necessary for me to remove Mr. Hull for that reason from his office.

The other case was that of a person named William Sanders, found dead in his bed at Weybourne, near Farnham, on the morn-

ing of the 15th of May, 1882, and on whose body Mr. Hull held no inquest, determining (in the exercise of a "discretion," which he conceived to belong to him) that it was not necessary.

The death was reported to him, with a view to an inquest proposed to be held at the Elm Tree Tavern, Weybourne, by the superintendent of police at Farnham, on the same 15th of May, 1882. This report was made, by filling up a printed form, in use for that purpose, with an addition thereto in manuscript; and, as the whole information which Mr. Hull ever received as to this case is contained within the four corners of that report, it becomes necessary to state its precise effect. "It is my duty" (said the superintendent) "to report to you the sudden death of William Sanders, now lying dead at his residence at Weybourne, near Farnham, in the parish of Farnham (two miles from Aldershot), in the county of Surrey." In the form there were blanks to be filled up as to various particulars, of which, in this case, only four were filled up, viz.:—(1.) "Age:—61;" (2.) "Occupation:—Gardener;" (3.) "On what day death occurred:—Between the 14th and 15th of May, 1882:" (4.) "Where inquest is to be held:—Elm Tree Tavern, Weybourne." The other material particulars left blank were these: (5.) "Who present at death;" (6.) "*If cause of death known, to be stated, with or without injury;*" (7.) "If found, and by whom last seen alive." The superintendent added: "The deceased went to bed in his usual state of health, and was found dead in bed the following morning. Dr. G. Sloman of Farnham was sent for, but he states that he cannot give a certificate of the cause of death; and it does not appear that the deceased has been medically attended by any one else."

The case, therefore, was one of sudden death, without any information as to its cause. It might, or it might not, have been from a natural cause: it did not appear, on the one hand, that there had been any previous disease or illness; or, on the other hand, that there was any sign, or any actual suspicion, of violence, suicide, or crime. There was nothing to suggest, affirmatively—(but there was also nothing to exclude, negatively) the possibility of death from some cause proper to be investigated, e.g., poison. The superintendent of police had appointed a place for an inquest; there was no medical certificate; there was no reason to suppose that

1882

IN RE HULL.

any of the relatives, friends, or neighbours of the deceased thought an inquest unnecessary or undesirable. On the contrary, it appears by the correspondence which soon afterwards followed between Mr. Knight (a neighbour and former employer of the deceased) and the coroner, and by a statutory declaration of the son-in-law of the deceased (with whom he lived), that the relatives and Dr. Sloman and Mr. Knight all expected and desired that there should be an inquest and a post mortem examination. Mr. Hull says he was not informed of this, and that a post-mortem examination might have been made without any inquest. But the question is, whether, having received such a report as this from the superintendent of police in the discharge of his public duty, and knowing no more, it was not Mr. Hull's duty to hold an inquest in the absence of any request (on the one hand) or any intimation of objection (on the other), on the part of the friends and relatives of the deceased.

What Mr. Hull did was this. He applied, through the superintendent of police, to Dr. Sloman for a certificate that Sanders had died from natural causes, tendering him a guinea fee for such certificate. This Dr. Sloman declined to give; it being contrary to his general practice to give such a certificate, when he had not attended the deceased person during his life; and there being in this case (as I assume) no clear external evidence of the cause of death. In this Dr. Sloman acted rightly. Mr. Hull then telegraphed to the police that an inquest was unnecessary, and that the body should be buried upon the registrar's certificate of death. Information that no inquest would be held was accordingly given to the son-in-law of the deceased on the 18th of May, and the body was buried on the day following. In the meantime, Mr. Knight had written to Mr. Hull, asking when the inquest would be held; and to that inquiry Mr. Hull replied, on the 20th (the day after the funeral), saying that he had only just received Mr. Knight's letter, and that he had telegraphed that an inquest "was not necessary," because "it seemed to him to be a case of death from natural causes." Mr. Knight wrote again on the 22nd of May, asking how he had satisfied himself that an inquest was not necessary; to which question Mr. Hull replied thus: "I did not hold an inquest on the body of Sanders because *I under-*

stood from my officer at Kingston that it was supposed he had died from heart disease: I thought it unnecessary, therefore; and, besides, I was full of work at different parts of the county for days, and I could not have come to Farnham before Friday evening at the earliest; and I thought it better the body should be buried."

The "officer at Kingston" (where the coroner has his office, being twenty-five miles distant by rail from Farnham) was a person named Browne, who has made a statutory declaration in support of Mr. Hull's case. It is not pretended that Browne either had, or was by Mr. Hull supposed or believed to have, any knowledge whatever of the deceased, or of the cause or circumstances of his death. He says, in support of Mr. Hull's statement, this, and no more: "That on the 16th day of May, 1882, I received at the coroner's office in Kingston, by the 8 A.M. post, information of the death of one William Sanders at Farnham, and that I handed such information to the coroner in the course of the same morning. I believe I pointed out the meagreness of the information, and told the coroner that it was probable the deceased had died from heart disease."

If the information was meagre, the coroner took no step to obtain further or better information, except the communication which he caused to be made to Dr. Sloman. As to that communication, it was explained by Mr. Hull's counsel (and a similar explanation seems to have been made, and accepted by me, in the course of last year's inquiry), that fees paid by the coroner to medical practitioners for certificates of death from natural causes, rendering inquests unnecessary, are usually allowed to the coroner by the county authorities in passing his accounts. If Dr. Sloman had, in this case, been in a position to give such a certificate, it may very well be, that the coroner might have been justified in concluding that an inquest was unnecessary. I do not, therefore, consider that the coroner did anything improper in taking steps to ascertain whether the want of a proper fee was the cause of Dr. Sloman not certifying, or in offering to pay the fee if a certificate were given. Mr. Browne's suggestion of heart disease could not have been regarded by the coroner as adding anything to the information which he had previously received; but such a cause

1882

IN RE HULL.

of sudden death is so common as to justify the application made by him to Dr. Sloman. Dr. Sloman, however, could not, and did not, certify; and Mr. Hull did not seek for information in any other quarter. The result is, that he had no means of forming any opinion as to the actual cause of death in this case, which he would not equally have had in any other case, in which he knew no more than that a man, aged sixty-one, had been found dead in his bed.

No time was lost by Mr. Knight in bringing this matter to the attention of the Home Secretary and of myself, which was done on the 1st of June, 1882; and, after receiving a letter of explanation from Mr. Hull, dated the 14th of June, I thought the case sufficiently important to make it my duty to call upon him, for the second time, to shew cause why he should not be removed from his office of coroner.

The explanation offered in his letter was this: "I have been repeatedly blamed for holding inquests in cases similar to this; and it was only on Monday last, the 12th instant, that, upon holding an inquest in the parish of Bletchworth, on the body of a man named Charman, I was informed by the medical man that no inquest was required, as he was satisfied that the man had died from heart disease, and that he would have given a certificate to that effect.

"I conceive that it is not part of my duty to hold inquests upon every death reported to me, and I submit, with all deference, that I, as coroner, have a discretion as to the cases which primâ facie appear to require an investigation. In all cases where any appearance of violence or suspicion of foul play is reported to me, I hold inquests; and where, apparently, the death is due to natural causes and the people are well-known to the neighbourhood to be respectable, I conceive it far more advantageous to the county and to the friends and relatives of the deceased, that an inquiry, expensive to the former and abhorrent to the latter, should be avoided."

Considerations such as these would be entitled to weight in a case in which some real ground was laid for them. But in this case there was no medical opinion that the man had died from heart disease, or from any other natural cause. The coroner had

no information, and does not allege that he had any personal knowledge, as to the respectability, or otherwise, of "the people." He had no reason to know, or to suppose, that the friends or relatives of the deceased would object to an inquest; the contrary was the fact. Instead, therefore, of the case being similar to those suggested, it appears to me to be in contrast with them on the most material points.

Mr. Hull suggested, and his counsel also strongly insisted before me, that in all cases, except those in which some "appearance of violence, or suspicion of foul play," is reported to the coroner, he is under no obligation to hold inquests, unless in his discretion he thinks fit to do so; and this, although the case may be one of sudden death, reported to him by the police authorities with a view to an inquest, and though he may have no information of any fact or circumstance tending to shew, affirmatively, that the cause of death was natural, or that an inquest would be improper. In support of that contention, the learned counsel who appeared before me referred to a passage in Sir John Jervis's Manual on the "office and duties of coroners," in which it is said, as to the "dying suddenly" (spoken of in the statute "de officio coronatoris"), that this "is not to be understood of a fever, apoplexy, or other visitation of God; and coroners ought not in such cases, nor indeed in any case, to obtrude themselves into private families for the purpose of instituting inquiry, but should wait until they are sent for by the peace officers of the place, to whom it is the duty of those, in whose houses violent or unnatural deaths occur, to make immediate communication whilst the body is fresh, and, if possible, whilst it remains in the same situation as when the person died. But, under whatever circumstances, this authority must be exercised within the limits of a sound discretion; and unless there be a reasonable ground of suspicion that the party came to his death by violent and unnatural means, there is no occasion (except in the case of a person dying in gaol) for the interference of the coroner. And coroners, when paid by fees, were frequently censured by the Court for holding inquests for the sake of enhancing their emoluments, where there was no reasonable probability that the deaths occurred from violence or unnatural causes."

1882

IN RE HULL.

This argument raises an important question of principle. It is at variance with the view expressed by me, after the former proceedings against Mr. Hull, as to one of the cases then in question; on which my opinion was thus stated:—"In the third case, that of Garratt at Egham, in July, 1879, the death was sudden; and the medical man, who was called in, refused to give a certificate of the cause of death, considering an inquest to be necessary. The coroner has not given any reason, satisfactory to my mind, for his omission to hold an inquest in that case. He says he was informed, and believed, that the deceased had been ailing some time, and had at last succumbed from natural causes, and that, in the exercise of his discretion, he held an inquest to be unnecessary. No evidence is produced to justify or to shew the grounds of that conclusion; and, in my opinion, an inquest ought in that case to have been held. But, although such is my opinion, I cannot say that this is so clear a case of misbehaviour in office (as distinguished from error in judgment), as to require the extreme penalty of removal."

I am compelled to say that, whatever difference there is between the case of Sanders and that of Garratt, is unfavourable to the coroner. Here, as well as there, the medical man who was called in refused to give a certificate of the cause of death, and must, in my opinion, be taken to have considered that an inquest ought to be held. There, the coroner stated (though he did not substantiate the statement by other evidence), that he was informed and believed that the deceased had been ailing some time, and had at last succumbed from natural causes. Here he does not, and could not, say that he had received any information on which he could have founded such a belief; for, as I have already said, the suggestion of his clerk Browne (who was as ignorant of the facts as himself), was not such information. A repetition (in a stronger case) of conduct which I thought not justified in the case of Garratt, can hardly, after such an expressson of my opinion, be excused as a mere error in judgment. I do not, however, hold Mr. Hull concluded by my former opinion; and I have thought it my duty now carefully to reconsider the question, with regard to the general statement, as to the discretion which coroners ought to exercise, contained in the passage cited from Sir John Jervis's

book. It is no doubt true (and Mr. Hull ought to have the benefit of it) that Sir John Jervis's manual is constantly in the hands of coroners, and that they have reason, generally, to place reliance on its statements as to matters of law.

In the earlier part of that passage, I find nothing at variance with the view of a coroner's duty taken by me in Garratt's case. It assumes knowledge by the coroner, from some source of information on which he may reasonably rely, that the cause of a sudden death has been, in point of fact, some visitation of God, such as fever, apoplexy, or other disease, in which case it lays down (I think rightly) that an inquest is not necessary. It adds (I also think rightly) that coroners ought not voluntarily to obtrude themselves into private houses, when they have received no notice from the police or any other authority that death has occurred under circumstances which appear to them to call for an inquest. This is the same doctrine which was laid down by Holt, C.J., in *Reg.* v. *Clerk* (1), where he said, "The coroner need not go ex officio to take the inquest, but ought to be sent for." I myself entirely agree with the opinion that the officious interference of coroners, when not sent for, and when they have received no notice from any public authority, would be in many cases a censurable excess of their duty. Nor do I see any reason for calling in question the statement that "under whatever circumstances," the authority of the coroner must be exercised "within the limits of a sound discretion." The information received by him, from whatever quarter it comes, may be such as to shew that an inquest is not necessary. In all that follows, I understand the learned writer to have had still in view, not a case like the present, but one of voluntary and uncalled for "interference" on the part of a coroner, which he might justify, if the death occurred in a gaol, or if he had "a reasonable ground of suspicion that the party came to his death by violent and unnatural means," but which (otherwise) would be liable to censure, particularly if the motive for such interference might appear to be the increase of his own emoluments. Sir John Jervis cannot have meant to lay down the doctrine that a coroner ought never to discharge the duty of his office (except in a gaol) without having beforehand some positive

(1) 1 Salk. 377.

1882

IN RE HULL.

ground for reasonably suspecting a violent or unnatural cause of death. This would place a limitation on the letter of the statute "de officio coronatoris," not warranted by its context or purpose. The statute expressly directs inquiry to be held, when persons are (among other things) "suddenly dead;" and, in the second section, the inquiry "of them that be drowned, or suddenly dead," is directed to be made in like manner as in cases of homicide; which are dealt with by the first section. No doubt the main object of all such inquiries is to ascertain whether the death has been caused by any violence or criminal act. But when nothing is known as to the actual cause of a sudden death reported to the coroner by the proper police authority, the purpose for which the office of coroner exists might often be frustrated, if it were held, that he ought not to take an inquest unless or until he is in possession of some evidence or information sufficient to raise a positive presumption (or at least a reasonable suspicion) of death from violence or other unnatural cause. I am of opinion, that, when a coroner receives from the proper police authorities information of a sudden death, in order that an inquest may be held, and when there is no medical certificate of death from any natural cause, or other ground on which he can reasonably form an opinion as to the actual cause of death, it is his duty to hold an inquest; and that, in such a case, he cannot properly exercise any discretion to the contrary, unless (by inquiry or otherwise) he has obtained such credible information as may be sufficient to satisfy a reasonable mind that the death arose from illness, or some other cause rendering an inquest unnecessary.

I have anxiously considered the question, whether, after the warnings which he has already received, and after the expression of my opinion on a similar point last year (to which opinion I now adhere) I may not myself be unduly lenient in allowing Mr. Hull still to retain his office. But I feel that he may have been led, by the passage referred to in Sir John Jervis's book, to believe in good faith that he had a larger discretion than that which I consider him to possess, and that, in the circumstances of Sanders's case, he may have honestly supposed the presumption to be rather against than in favour of an inquest. It is not without some difficulty that I now give him the benefit of that doubt, and he

must clearly understand, that, if I should receive any complaints hereafter against the manner in which his duties are performed, which may not be met by answers more satisfactory to me than has hitherto been the case, I am not likely to feel myself at liberty to extend to him further indulgence.

1882

IN RE HULL.

Judgment accordingly.

Solicitor for Mr. Hull: *Benjamin.*

A. P. S.

[IN THE COURT OF APPEAL.]

July 13.

THE QUEEN *v.* WEIL.

Extradition—"Apprehension"—Person already in Custody—Arrest without a Warrant—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 8—*Court of Appeal—Jurisdiction—Criminal Matter—Habeas Corpus—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.

Under s. 8 of the Extradition Act, 1870, a fugitive criminal who is already in custody may be detained for an offence coming within the Act, even though he was originally arrested without any warrant. The word "apprehension" in s. 8 includes "detention."

Semble, per Brett, L.J., that a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom.

Whether the Court of Appeal has any jurisdiction to entertain an appeal from the refusal of a Divisional Court to issue a writ of habeas corpus, on the application of a person who has been arrested for an alleged extradition crime, *quære.*

ON the 25th of May, 1882, Jacob Weil, who had just arrived in the ship *Servia* from the United States of America, was arrested in the harbour of Queenstown, in Ireland, by James Maguire, an Irish police officer, on a charge of having committed forgery in New York. The arrest was made without any warrant, in consequence of a telegram which Maguire had received from George Kendal, a private inquiry agent in London. Kendal sent this telegram in consequence of a telegram, dated the 24th of May, which he had received from a private inquiry detective at New York, which stated that Weil had that day been indicted there for forgery. The prisoner was then taken before Mr. Starkie, the resident magistrate at Queenstown, who the same day issued a warrant, addressed to the sub-inspector of Royal Irish Consta-

1882

THE QUEEN v. WEIL.

bulary, directing him to lodge Weil in the gaol at Queenstown, on remand for further examination within three days. On the 28th of May the prisoner was brought up for further examination, when the depositions of Kendal and Maguire were taken, and on the 31st of May the magistrate issued a warrant for the conveyance of the prisoner to London, and taking him before the chief magistrate at Bow Street. On the 28th of May the magistrate at Queenstown reported the arrest to Sir W. Harcourt, the Secretary of State for the Home Department. Under the warrant of the 31st of May the prisoner was taken to London, and he was on the 2nd of June brought before Sir James Ingham, the chief magistrate at Bow Street, and was remanded till the 8th of June. On that day he was again remanded till the 15th of June, on which day he was brought up and again remanded to the 22nd of June. Sir James Ingham then represented the matter to the Home Secretary, and he, on the 19th of June, issued an order addressed to the chief magistate, at Bow Street, which stated that, in pursuance of the Extradition Acts of 1870 and 1873, a requisition had been made to him by Mr. J. R. Lowell, the diplomatic representative of the United States of America, for the surrender of Weil, and required the magistrate to proceed in conformity with the provisions of the Acts. The prisoner was brought up for further examination on the 22nd of June, when his counsel took the objection that he was illegally in custody, as he had been arrested without any information or complaint being made, and without any warrant. Sir James Ingham expressed an opinion that the error (if any) was rectified by the order of the Secretary of State, and issued a warrant for the prisoner's apprehension. The warrant was afterwards read over to the prisoner while he was in the dock, and on the 29th of June Sir James Ingham issued a warrant for the prisoner's committal (in the form given in the 2nd Schedule to the Act of 1870.) This warrant was not addressed to any constable by name, but was left in blank. Under it the prisoner was lodged in Clerkenwell Prison. Application was then made on his behalf to the Queen Bench Division for a writ of habeas corpus.

July 10. *Mead,* for the prisoner, ex parte.

THE DIVISIONAL COURT (Lord Coleridge, C.J., and Field, J.), refused the application.

Weil appealed.

July 13. *W. G. Harrison, Q.C.*, for the appellant, ex parte.

The proceedings have been irregular. The original arrest without a warrant was unlawful, and the warrant afterwards issued by the magistrate at Queenstown was not a warrant for the "apprehension" of the prisoner within the meaning of s. 8 (1) of the Extradition Act, 1870, he being already in fact, in custody. The Act must be strictly construed. Before a man who is in illegal custody can be properly apprehended under the Act, he must be set at liberty.

And, even if the Irish magistrate had issued a proper warrant

(1) Sect. 7 of the Act provides that "A requisition for the surrender of a fugitive criminal of any foreign state, who is in, or suspected of being in, the United Kingdom, shall be made to a secretary of state by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A secretary of state may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

"If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody."

Sect. 8 provides that, "A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in, or suspected of being in, the United Kingdom, may be issued—

"(1), By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would, in his opinion, justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

"(2), By a police magistrate, or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed, or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

"Any person issuing a warrant under this section without an order from a secretary of state shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint or certified copies thereof, to a secretary of state, who may, if he think fit, order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged."

1882

THE QUEEN v. WEIL.

for the apprehension of the prisoner, the evidence before him was not sufficient to justify him in so doing.

[BRETT, L.J. Does an appeal lie in such a case? Is not this a criminal matter?

JESSEL, M.R. Referred to the Judicature Act, 1873, ss. 19, 47.]

This is not a criminal matter. It is like a case of prohibition. Appeals have been entertained in such cases. In *Dale's Case* (1), the Court of Appeal discharged a prisoner. The Court of Appeal has power to issue a habeas corpus.

[JESSEL, M.R. If an appeal lies.]

This is not criminal matter. It is an entirely collateral proceeding. It is a question of the liberty of the subject. The appellant says he is not a criminal.

[JESSEL, M.R. We will reserve this point. I do not see how we can determine it till we know more about the case.]

The Secretary of State's requisition was not in accordance with the form given in the schedule to the Act. It did not require the magistrate to issue a warrant for the apprehension of the fugitive, but only "to proceed in conformity with the provisions of the Acts." It gave no authority to issue a warrant for the apprehension of the prisoner. Then the warrant of committal afterwards issued by the chief magistrate was irregular, It was not addressed to any constable by name.

JESSEL, M.R. There will be a serious question to be considered at some time, if the case should ever arise, whether, having regard to the provisions of the Judicature Acts, the Court has jurisdiction to entertain an appeal from a Divisional Court in a case like the present. The question whether we have jurisdiction depends on a very careful consideration of various sections of the Acts, and it is far too serious and grave a matter for me to give an opinion upon it off-hand. If it were necessary to decide it I should take time to consider it, and I should require to hear further argument. For the purpose of deciding the present case I will assume that we have the jurisdiction. But it does not appear to me that the only objection to the prisoner's committal which can be fairly argued is of such weight as to justify us in

(1) 6 Q. B. D. 376.

interfering by granting a habeas corpus. The question turns on the proper construction of sect. 8 of the Act of 1870. In the present case the applicant was accused of committing forgery in the United States. He was arrested on board a steamer at Queenstown harbour by an Irish police constable, without any warrant, and was brought before a police magistrate there, who then issued a warrant ordering his detention in prison, and after further inquiry he issued another warrant for taking the prisoner before the chief magistrate at Bow Street, and he then reported the arrest to the Secretary of State for the Home Department. The prisoner having been brought before Sir James Ingham, the chief magistrate, he directed the usual reference to the Secretary of State, and within the time limited by the Act he received a requisition from the Secretary of State requiring him to proceed in conformity with the Act. A warrant was then issued for the prisoner's apprehension, and afterwards an order was made for his committal. All the proceedings were strictly regular, with this exception, that the prisoner was originally arrested without any warrant, and the whole objection is this, that the Irish magistrate's warrant was not a warrant for the "apprehension" of the prisoner within the meaning of s. 8 of the Act. It appears to me that this would be to give too narrow a meaning to the word "apprehension." The word strictly construed means the seizing or taking hold of the man, and literally and truly you can do that although he may be already in custody. It means the taking hold of him and detaining him with a view to his ultimate surrender. I am not inclined to limit the word "apprehension" to the taking hold of a man who is not already in custody. It would follow that if a man was already in lawful custody you could not take him at all under this Act; the word "apprehension" would not apply. You would be compelled to restore him to liberty before you could apprehend him. It appears to me that this would not be a rational mode of construing the Act. I think, therefore, that the whole of the proceedings were regular.

Another point suggested was this—that the evidence on which the Irish magistrate issued his warrant was not such as would have justified the issue of a warrant if the crime had been com-

1882

THE QUEEN v. WEIL.

mitted or the criminal convicted in Ireland. But all that the Act requires is that the evidence should be sufficient "in the opinion of the person issuing the warrant." That is a matter of judicial discretion. There must be some evidence, but very little will do, for it is merely for the purpose of detaining the man. It is very different from the evidence which is required under s. 10 to justify the committal of the prisoner. There the evidence must be such as would, "according to the law of England, justify the committal for trial of the prisoner, if the crime of which he is accused has been committed in England." There is nothing in the present case to shew that the evidence was not sufficient in the opinion of the magistrate. Assuming, therefore, that we have jurisdiction, I think that in the present case we ought not to interfere.

BRETT, L.J. I desire to give no opinion on the very important question whether there is any jurisdiction in this Court to consider whether in a case of this kind a writ of habeas corpus should or should not issue. What we are doing to-day must not be construed as a decision that we have any jurisdiction. But, assuming that we have jurisdiction, I think there is no ground for our exercising it in the present case. I doubt whether there has been any irregularity whatever in the proceedings. I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country. But, assuming that the Irish policeman was wrong in making the arrest, the Irish magistrate issued a warrant that the prisoner should be detained in custody, and afterwards a second warrant that he should be taken before the chief magistrate at Bow Street. It seems to me that the Irish magistrate's first warrant was a warrant for the "apprehension" of the prisoner within the meaning of the Act. I cannot think that the Act ought to be construed in the way suggested. It is necessary that the magistrate should issue a warrant for the "apprehension" of the criminal, but if he is already in custody a warrant for his detention is a warrant for his "apprehension." But, if it was necessary to do more, Sir James Ingham issued a warrant for the detention of the prisoner, and it seems to me that that was a warrant for his "apprehen-

sion" within the meaning of the Act. If he was already wrongfully in custody and there was proper evidence to justify his apprehension, Sir James Ingham was justified in issuing a warrant for his detention. It is said that the warrant of committal was wrong, because it was not addressed to any particular policeman by name; but in my opinion when the warrant was handed to a particular policeman for execution it was as good as if it had been addressed to him by name. I am inclined to think that there was no irregularity in the proceedings. If there was any, it was in the original arrest. But that is immaterial when the subsequent proceedings have been right.

COTTON, L.J. I desire in no way to intimate an opinion whether we have or have not jurisdiction to entertain an appeal in such a case as the present. But, assuming that we have jurisdiction, I think no ground has been shewn for our interfering. I give no opinion on the point whether the original arrest was lawful, nor on the point whether, assuming that there was no lawful arrest before the prisoner was brought before Sir James Ingham, there was afterwards a valid apprehension. In my opinion the first warrant of the Irish magistrate was within the meaning of the Act a warrant for the apprehension of the prisoner. I am of opinion that in substance the requirements of the Act have been complied with.

Appeal dismissed.

Solicitor: *W. D. Smyth.*

W. L. C.

1882

July 31.

STOCK *v.* INGLIS.

Insurance (Marine)—Insurable Interest—Goods in which Property not passed to Assured—Non-appropriation of Specific Goods to Contract.

The plaintiff had effected a "floating" policy of marine insurance on "goods," upon which he sued an underwriter under the following circumstances:—By contract of the 7th of January, D. & Co., sugar merchants in London, agreed to sell to B. & Co. 200 tons of sugar of a certain description to be shipped from Hamburgh to Bristol at the price of 1*l.* 1*s.* 9*d.* per cwt. net f. o. b. at Hamburgh; payment to be by cash, in London, in exchange for bill of lading. By contract of the 12th of January, D. & Co. agreed to sell a similar quantity of sugar to the plaintiff upon the same terms. B. & Co. entered into the contract of the 7th of January in order to enable themselves to execute a contract previously made by them with the plaintiff for the sale of the same quantity of sugar. Until after the loss hereinafter mentioned D. & Co. were not aware of B. & Co.'s contract with the plaintiff, nor was the plaintiff aware that D. & Co. were the shippers of the 200 tons contracted to be sold to him by B. & Co. The requirements of the Satute of Frauds had been complied with in the case of the above-mentioned contracts of the 7th and 12th of January, but not in the case of the contract between B. & Co. and the plaintiff, there being no sufficient memorandum of that contract within the statute.

D. & Co. advised their forwarding agents at Hamburgh that they had sold 400 tons of sugar for Bristol, and in pursuance of such advice, 3900 bags of sugar were shipped at Hamburgh, consigned to "order, Bristol," by such agents who forwarded the bills of lading for the sugar indorsed in blank to bankers in London with instructions to deliver them to D. & Co. against payment of amounts advanced in respect of the price of the sugar paid to the manufacturer in Germany. The sugar so shipped was of the description specified by the above-mentioned contracts, but was insufficient in quantity by 100 bags to satisfy the two contracts of the 7th and 12th of January.

No appropriation of specific bags to each of the two contracts respectively was made by D. & Co. or their agents at the time of shipment. The ship on which such shipment was made was lost with her cargo on the voyage. Before the news of the loss reached them, D. & Co. took up the bills of lading in due course, and they then apportioned the bags of sugar shipped between the contracts of the 7th and 12th of January, appropriating certain specific bags to the number of 2000 to the former and the remainder to the latter, and made out separate invoices in respect of each contract to B. & Co. and the plaintiff respectively setting out the marks and numbers of the bags. The invoices were then posted by D. & Co. to B. & Co. and the plaintiff respectively, but before they were so posted the news of the loss of the ship had reached D. & Co. and the plaintiff. The plaintiff on learning of the loss, anticipating that sugar destined for him might have been shipped on board the ship, although without specific advice of any such shipment, declared on the ship in respect of 200 tons of sugar under the floating policy before-mentioned. The plaintiff and B. & Co. subsequently, on receipt of the invoices, respectively paid the contract price of and obtained

1882

STOCK v. INGLIS.

the bills of lading for the sugars specified in their respective invoices. B. & Co. then forwarded the invoice received by them to the plaintiff, who thereupon paid them for the sugar included in that invoice and received the bills of lading in respect thereof. The plaintiff then further declared under the floating policy in respect of this last-mentioned sugar:—

Held, in an action on the policy, that the plaintiff had no insurable interest in any of the sugar shipped as aforesaid, inasmuch as there had not been prior to the loss any appropriation of specific sugar to the respective contracts of the 7th and 12th of January:

Held, also, that although the plaintiff had no insurable interest in the sugar, he had an insurable interest in "profits," but that this was not covered by a policy on "goods."

FURTHER CONSIDERATION before Field, J.

The facts sufficiently appear from the judgment.

April 22, 29. *Charles Russell, Q.C., Myburgh, Q.C.*, and *Danckwerts*, for the plaintiff.

May 6, 13. *Butt, Q.C., Cohen, Q.C.*, and *Gorell Barnes*, for the defendant.

Cur. adv. vult.

July 31. FIELD, J. The plaintiff in this action (a Bristol merchant) seeks to recover from the defendant (an underwriter at Lloyd's) under a "floating" marine policy on "goods," a proportionate part of the value (with 10 per cent. profit) of 3900 bags of sugar, lost with the *City of Dublin* on the 4th of February, 1881, on a voyage from Hamburgh to Bristol.

The sugar had been shipped at Hamburgh by or on behalf of Messrs. J. V. Drake & Co. (London merchants), and had been bought by them of German manufacturers.

In the process of manufacture of sugar, although the parcels manufactured at each "make" are in general respects similar, the parcels turned out at any one make will differ slightly from any other in the number of degrees of saccharine matter which it contains, and the bags of each particular make bear a distinctive mark and number, say, D 200, D 201, &c., and the whole lot contains the same number of degrees of saccharine matter, and is otherwise identical in quality and description.

The sugar contained in each lot is separately analysed in Germany, and a certificate of the analysis, referring to the mark and

1882

STOCK v. INGLIS.

number of the bags in which it is packed, is forwarded to Drake & Co. in London, so that the quantity of net saccharine in the lot is communicated to them.

The sugar is then invoiced to Drake & Co. in bags, the invoice referring in like manner to the marks and numbers; by comparison, therefore, of the marks invoiced with the certificates of analysis, Messrs. Drake & Co. know the quantity of saccharine matter contained in each parcel invoiced.

The sugar is then forwarded by the manufacturers to an agent of Drake & Co. at Magdeburgh (Paul Peckstein), and the amount of the invoice is paid in cash on behalf of Drake & Co. by their German bankers (the Credit Anstalt of Leipsic) to the manufacturers, upon delivery by them to the railway company.

In order to secure the repayment to the Credit Anstalt of this advance, there is an arrangement between them and Drake & Co. by which certain forwarding agents at Hamburgh (in the present instance Herrmann and Theilnehmer) ship and consign the sugars on their arrival at Hamburgh according to Drake & Co.'s orders.

The forwarding agent, however, does not ship them in Drakes' but in his own name, and he takes the bills of lading deliverable to "order" in London or Bristol, as the case may be, and then forwards the bills indorsed in blank to the London correspondent of the Credit Anstalt, who is instructed by the latter to deliver them to Drake & Co. against cash payment by them of the amount of the invoice.

The forwarding agent of course keeps Drake & Co. advised of the marks and numbers in course of delivery and arrival at Hamburgh, and asks for and obtains shipping orders from them, and, as the certificates of analysis then already in the possession of Drake & Co. enable them to know the precise net saccharine contents of each lot of 500 or 600 bags so advised, they can allot each bag or lot of bags to such one of their buyers with whom they are under contracts, so as to correspond in respect of the specific quantities of net sugar with the degree contracted for.

The contracts for delivery in England made by Drake & Co. are uniform, or nearly so, in terms. They are for delivery f. o. b. Hamburgh, and the quantities are expressed in "tons" weight.

But the price is not calculated according to the weight per ton

of the gross, but at so much per degree of net saccharine matter contained in the sugar as represented by the analysis.

A standard degree is specified in the contract (say 88) with a payment or allowance of 6*d.* for every degree above or below the average analysis of the whole contract, but anything above a given percentage (say 92) is not paid for, and if the average analysis of the whole contract exceed (say 90) such excess is not paid for.

When, therefore, Messrs. Drake & Co. are desirous of appropriating at Hamburgh the number of bags required for the execution of one or more contracts for sugar destined for any one port (say Bristol), it is obvious that the assortment must be so made before shipment, that there shall be delivered such a gross number of bags as the port requires, and the bags so shipped must be made up of such particular bags as shall contain enough sugar of certain degrees, so that on arrival of the bills of lading in London Messrs. Drake & Co. can make up each particular contract in such manner that no part of the sugar to be supplied under that contract shall exceed 92, and that the average of the whole shall not be more than 90, for all net above, although paid for by Drakes in Germany, would under the terms of the contract go for nothing in England, and so be a loss to them.

Messrs. Drake & Co. having thus ascertained which of the bags advised can be best averaged to any particular port, the gross quantity destined to that port is shipped without any sub-division, leaving the operation of apportioning the gross shipped to the port amongst the different contracts at the port till after the receipt by Messrs. Drake & Co. in London of the bills of lading.

Indeed in some cases it is impossible for them to make this further apportionment before, and it is their usual course of business not to make it until after they have obtained the bills of lading by payment to the agent of the Credit Anstalt of the amount of the invoice.

After having thus obtained the bills of lading Drake & Co., on comparison of the bills of lading with the certificates of analysis, apportion the bags, and the bills of lading representing them, between their different buyers at the port for which they are shipped, and invoice the sugar to them accordingly.

1882

STOCK v. INGLIS.

Messrs. Drake & Co.'s transactions of this character are very extensive, and have been so, as well with the plaintiff as others, and the general course of business between them and their buyers has been for the buyer to bear the cost of the insurance against sea risks from the time of delivery.

The buyers have usually themselves effected the insurance or declared the risk under floating policies, but in some cases Messrs. Drake & Co. have effected the insurance as agents of the buyer.

The sugars which were lost had been shipped on the *City of Dublin* in intended performance of two contracts made for sale and purchase entered into by Drake & Co. with two Bristol buyers, and at the time of the loss on the 4th of February the position of things with regard to these contracts was as follows:

By the earliest of these two contracts (the 7th of January), Drakes agreed to sell to a Bristol firm, W. Beloe & Co., 200 tons of sugar, price 21*s.* 9*d.* per cwt. net f. o. b. Hamburgh for 88 degrees net saccharine contents. Sugar to analyse between 85 and 92 net, 6*d.* per cwt. to be paid or allowed for each degree above or below 88, but anything above 92 not to be paid for, and should the average analysis of whole contract exceed 90, such excess not to be paid for. For January delivery at Hamburgh. Payment by cash in London in exchange for bill of lading. By the second contract of the 12th of January, Drakes agreed to sell to the plaintiff a similar quantity at a like price upon identical terms.

After the loss it became for the first time known to Drake & Co. and to the plaintiff that Beloe & Co. had entered into the contract of the 7th of January with Drakes for the purpose of enabling them to execute a contract previously made by them on the same day with the plaintiff for 200 tons at an advanced price.

Although not, I think, material, it is as well to observe that in this contract the condition contained in Drakes' contract with Beloe as to the excess over 92 not being paid for was omitted, and it contained an additional term, also in my view immaterial, that the price f. o. b. was on "a steamship to Bristol."

At the time of shipment and loss, therefore, all that Drakes knew was that they had engaged to sell 400 tons destined for

Bristol, i.e., 200 to Beloe and 200 to plaintiff, and although plaintiff knew that he had 400 tons coming from Hamburgh, i.e., 200 tons to be shipped by Drakes and 200 to be shipped by some unknown shipper under Beloe, he did not know that Drakes were the shippers of the latter 200 tons, nor did Drakes know that Beloe was under any contract to deliver or plaintiff under any contract to take the 200 tons contracted for by Beloe.

It is also of importance to note that although in the case of the contract between Drakes and Beloe of the 7th of January, and of that between Drakes and the plaintiff of the 12th, the provisions of the Statute of Frauds were complied with by all the parties to them, such was not the case with the contract of the 7th of January between Beloe and the plaintiff, for that contract, although signed by Beloe as if he had been acting as broker, was not, nor was any note of it signed by the plaintiff (Beloe being a principal, and so not his agent for that purpose).

The consequence of course was, that although Beloe if he had been the party sought to be charged in any action upon this contract could not have availed himself of the provisions of the Statute of Frauds, the plaintiff was never until after the loss in a position to be charged in any action with any liability under it.

The ultimate destination of the whole 400 tons thus being Bristol, and the whole being deliverable by Drakes f. o. b. at Hamburgh during the month of January, it became necessary that provision should be made for shipment.

The ordinary course of business, and which course was known to the plaintiff, was for Drakes' forwarding agents at Hamburgh to ship by that boat of the Hamburgh and Bristol line of steamers next due to sail after the time fixed for delivery, and the *City of Dublin* was the one in turn for the departure at the end of the last half of January.

The agents for this line are, at Hamburgh, Niessle & Günther, and at Bristol, Edward Stock & Son, and the latter make it their business to keep themselves informed of all contracts for sugar made for shipment from Hamburgh to Bristol and to keep Niessle & Günther advised of all such sales.

The plaintiff had immediately after making each contract of the 7th of January with Beloe and the 12th with Drake & Co.

1882

STOCK v. INGLIS.

entered into binding contracts for sale to the Bristol Sugar Refining Company, of identical quantities upon identical terms, except that the sale was at an advanced price of 22*s.* 7½*d.*, leaving him therefore the difference between that and 21*s.* 9*d.* as profit.

The plaintiff was therefore anxious for the regular delivery by Messrs. Drake & Co. of the sugar he had thus contracted for, and he immediately informed Edward Stock & Son of the purchase he had made of Beloe, and requested them to reserve space by the last departure for the month, but as he did not know from what shippers Beloe would supply his contract, all the advice he could give was the fact of the sale.

In like manner, on the 12th of January, the plaintiff asked Edward Stock & Son to reserve space for that parcel.

It also appears that Beloe had requested Edward Stock & Son to reserve space for the same 200 tons, the identity however, not being at that time known to the agents.

The plaintiff also on the 31st of January, in writing to Drakes, expressed his hope that the 200 tons of the 12th, were on the steamer then due to leave Hamburgh, and in reply he received a letter from Drakes that this sugar was not only at Hamburgh, but that there would probably be extra expense chargeable to him owing to delay in steamer's arrival out, and consequent delay in departure. About the same time, Drake & Co. also advised Herrman & Theilnehmer, their Hamburgh forwarding agents, that they had sold 400 tons for Bristol and gave them the necessary orders as to which bags were to be shipped for that port, begging them to engage room by the *City of Dublin* and send the bills of lading to London as soon as possible.

Although however sugar in sufficient quantity and with suitable analysis had arrived at Hamburgh, so that Drake & Co. could have shipped either the 200 tons contracted for by the contract of the 12th of January with the plaintiff, or alternatively the 200 tons of the contract of the 7th of January with Beloe, the whole of the sugar which Drakes had appropriated to satisfy the two contracts together had not arrived at Hamburgh at the time of the departure of the steamer, and, in consequence, Herrman & Theilnehmer were not able to ship by the *City of Dublin* more than 3900 bags, and they advised Drake & Co. of

this short shipment, proposing to send the 100 short shipped by the next steamer due to sail on the 15th of February.

They did however ship 3900 bags, and took several bills of lading by which they were made deliverable to "order Bristol," but as Drake & Co. had not made any apportionment of the 3900 bags as between the two contracts (7th, Beloe's and 12th, plaintiff's) no appropriation was or could be made by them of any specific bags, that is to say, as to which of the bags were to be Beloe's and which of them the Plaintiff's, but the whole 3900 were shipped in one undistinguished mass and all were consigned simply "order Bristol."

With this sugar thus on board, the *City of Dublin* left Hamburgh on the 3rd of February, and on the morning of the 4th went down in the Elbe with her cargo.

By the post of the 2nd of February, Hermann & Theilnehmer had in the usual course forwarded the bills of lading of the sugar endorsed in blank to the London correspondent of the Credit Anstalt of Leipsic, and by post of the 3rd they advised Drakes of their having so done, in order that the latter might take them up together with those of other bags (2900) shipped to London by another steamer in the same manner.

On the 4th of February, and before any intelligence of the loss had reached Drake & Co., they, in due course, took up the bills of lading by payment of the amount of the invoices to the agents of the Credit Anstalt and then proceeded to apportion the 3900 bags between Beloe and the plaintiff, appropriating such of them as would make up the proper average for the plaintiff's contract to him, and such as would make up Beloe's contract to him according to the averages contracted for in each contract. At this time they had no knowledge that the sugar invoiced by them to Beloe would in fact be appropriated by him to the plaintiff under the sub-contract of the 7th of January, and they, therefore, made out two separate invoices in ordinary course to them as two separate purchasers, as in fact they were.

In doing this they had of course, as before explained, so to allot the bags to each particular contract as would best suit their own commercial convenience and advantage, and having made the selection of and appropriated 2000 of the bags out of the mass to

1882

STOCK v. INGLIS

Beloe, and 1900 others to the plaintiff, they made out the invoices accordingly, and of course the result was a short supply of the plaintiff's contract by 100 bags.

Each invoice, however, was so made up as to comply with the terms of each contract, that to Beloe shewing an average percentage on the whole of 89·5875 and that of the plaintiff of 89·35, both averages therefore being kept under 90.

Certainly, however, before these invoices were posted by Drake & Co. (whether before or after the appropriation does not appear) news arrived by telegram to them of the loss of the sugar.

News of the loss also arrived the same day in Bristol, and the plaintiff anticipating that he might have the 200 tons on board coming to him under his contract of the 12th, although without any specific advice of the shipment, declared on the *City of Dublin* under the policy now under suit for any loss in respect of those 200 tons.

In the letter to the plaintiff of the 4th of February, in which Drakes enclosed the invoice to the plaintiff for the 1900 bags, they proposed that the contract should be cancelled as to the 100 short shipment, and to this the plaintiff assented, but this of course was done after both parties knew of the loss.

The invoice to the plaintiff was headed "Contract, 12th January," it set out the marks and numbers of the bags and statement of the degrees of net saccharine matter.

With the invoice Drakes also forwarded a cash order for payment of the amount (4162*l.* 16*s.*) in Bristol, to the order of Williams, Deacon, & Co., in London in exchange for the bills of lading, and on the morning of the 5th the plaintiff paid the amount in exchange accordingly, and obtained the bills of lading of the sugar thus invoiced to him under the contract of the 12th.

A like course of forwarding invoice and bill of lading was undergone in Beloe's case between Drakes and him, the invoice being headed "Contract, 7th January."

The next step in the transaction was that Beloe being as before stated under contract to sell 200 tons to the plaintiff, but at an increased price, made out his invoice to the plaintiff making him debtor to himself and forwarded it to him with an intimation that the bills of lading were at the bankers, and requesting him to

forward to him, Beloe, a cheque for the amount, and this having been done the plaintiff received the bills of lading for the 2000 bags thus invoiced, and then also declared upon the present policy for this further loss making his total claim against the underwriters including the usual 10 per cent. added for profit 9530*l.* 19*s.* 8*d.*, and it was the defendant's proportion of this sum that the plaintiff sought to recover.

In consequence of the loss of the ship the plaintiff was of course unable to perform his two sub-contracts with the Bristol Sugar Refining Company, and therefore failed to realize the profit he had contracted for.

Upon these facts the plaintiff's right to recover was denied by the defendant on the ground that no property in the sugar had passed to him before the loss, and, secondly, that at the time of the loss he had no insurable interest in the sugar itself, and that even if he had an insurable interest in "profits" he was not entitled to declare the loss in respect of that interest upon a policy on "goods."

The first question therefore is whether at the time of the loss the property in the 3900 bags or any of them had passed to and was vested in the plaintiff.

Now, none of the three contracts which we have to take into consideration in the present case are for the sale of any specific goods, they are all executory, and no general rule can be more clearly established than that, in the case of a contract like that to deliver goods to answer a specific description, and where it is for the seller to ascertain which of his goods he will deliver in execution of his contract, the property which he has in those goods does not pass out of him or vest in the buyer until he has made an appropriation of those specific goods to the latter.

The question at what period of the transaction in such cases the property passes is often one not free from difficulty. The rule is that it is a question of the intention of the parties to be collected from the language of the contract coupled with the ordinary and usual course of business, and so collected in the present case it seems to me that the intention of the parties was that the seller should in each case select and ship at Hamburgh the specific number of bags contracted for on board a ship selected by the

1882

STOCK v. INGLIS.

buyer, the sellers taking for them a clean bill of lading to be afterwards handed to the buyer against payment in London of the amount of the invoice.

That this was the mode of delivery agreed upon appears from the terms as well of the two contracts of the 7th as of that of the 12th of January.

By them the goods which the seller should designate as the goods to answer the contract are to be delivered at Hamburgh at a price f. o. b., and of course before any such delivery could have been made the seller must have appropriated to each of his buyers the specific goods which he intended to deliver to him. Messrs. Drake & Co. had no knowledge of Beloe's sub-contract with the plaintiff, nor had they any intention to make any appropriation or delivery at Hamburgh to the plaintiff in respect of that contract, nor had the plaintiff any intention of taking delivery from Drake & Co. of that quantity, nor did he know that the 2000 bags which he had thus contracted to buy of Beloe were on board, although as the contract was to deliver on board a Bristol steamer by the end of January he would probably expect that some Hamburgh shipper would ship them by the last steamer of the month.

But if Messrs. Drake had, as they had contracted with the plaintiff to do, shipped f. o. b. at Hamburgh and appropriated to him under his contract of the 12th of January 2000 specific bags of sugar, there would have been a delivery to him of those bags in the agreed mode, and they would I think have become his property and insurable by him as his goods; they would have become so by the appropriation to the plaintiff and the delivery with the plaintiff's assent on board a ship designated by him and would of course have been at his risk.

So if the like course had been adopted in reference to the 2000 bags of sugar contracted for by Messrs. Beloe, the property in that sugar would, I think, have passed to Messrs. Beloe, and the sugar would have been at their risk on delivery.

I do not, however, see than even in that event the plaintiff would have acquired any property in those 2000 bags—there being no appropriation or delivery to or taking of delivery by him—either by or from Drake or Beloe.

But it is unnecessary to consider that question, because I have

come to the conclusion that there never was before the loss any sufficient appropriation and delivery by Drake & Co. either to the plaintiff or to Messrs. Beloe.

All that had been done by Messrs. Drake was to select from the large quantity of sugar which they had in Germany 4000 bags, with the general intention of consigning them to Bristol, and with the further intention of subsequently selecting from them bags such as from their analysis would suit Messrs. Drakes' commercial convenience and profit to appropriate to the plaintiff, and such others as would in like manner suit their contract with Beloe.

That selection and appropriation they purposely deferred until after the arrival of the bills of lading in London, and at the time they actually made it the loss had occurred, and at the time that they communicated that appropriation to the plaintiff, and he assented to it, he and they knew of the loss.

At the time of the loss, therefore, the power of selecting which bags should go to the plaintiff and which to Beloe still rested with Drake & Co., and no property in any specific bag passed to or vested in either Beloe or the plaintiff, nor could either of them have claimed to have any one bag rather than another.

It is unnecessary in this case to consider whether Messrs. Drake & Co. could have withdrawn any of the bags and substituted others, nor it is necessary to say what might have been the result if all the parties had known of the actual state of facts in reference to the three contracts, and had agreed and been willing that the whole 3900 bags should without any further selection have passed to the plaintiff, for this was not the case. Shipping as they did, Messrs. Drake had only the general intention of putting on board goods in quantity and quality fit to answer both contracts, and leaving the specific appropriation of the particular bags to each until they should have received the bill of lading. The plaintiff, as I have before observed, knew nothing about Drakes being the shippers of any goods which Beloe intended to appropriate to him, and had no intention of taking delivery of anything more than the 2000 bags which he had requested Drakes to ship per the *City of Dublin*. Indeed, as Beloe's contract with the plaintiff was at an advanced price, it was absolutely necessary (nothing else

1882

STOCK. v. INGLIS.

having been agreed to by way of substitution) that Messrs. Drake should first appropriate and deliver to Beloe his 2000 bags before the latter could appropriate and deliver to the plaintiff, and none of the parties contemplated that either the plaintiff or Beloe would each take delivery from Drakes of more than his 2000 bags.

Neither the plaintiff nor Beloe ever assented to any such general appropriation and shipment as was made by Messrs. Drake, and it did not appear that any such mode of carrying out any contracts in similar terms under similar circumstances had ever occurred before, so as to supply the want of actual assent by any assent to be implied from the course of business.

I am of course now speaking of what happened before the loss. After that event there was an assent by the plaintiff to what had been done, which if given with a knowledge of all the circumstances might have operated to pass the property in the whole to him from that time, and for some purposes by relation to the time of shipment.

It was of course competent to him to waive the default in delivery at the place agreed on, and if he pleased pay for the goods; but then as this assent and waiver did not take place until after the loss, the case of *Anderson* v. *Morice* (1) is an authority to shew that it was not competent to him by any assent or election at that stage to enable himself to throw any liability upon the defendant which did not exist at the time of the loss.

This proposition was also asserted in *Stockdale* v. *Dunlop*. (2) In that case there was no contract binding the seller within the Statute of Frauds, and the Court held that although as between him and the buyer the contract ultimately became capable of being enforced by a subsequent part delivery and acceptance, that circumstance would not operate retrospectively so as to dispense with a memorandum within the statute, and thus by relation charge the insurer.

In the view, therefore, which I have taken of the case upon this point it is unnecessary to consider the question which was raised on the argument whether either the Credit Anstalt or

(1) Law Rep. 10 C. P. 58; Ex Ch. 609; Law Rep. 1 App. Cas. 713.
(2) 6 M. & W. 224.

Messrs. Drake had (by taking the bills of lading making the goods deliverable to their order) so reserved the jus disponendi as to prevent the passing of the property to the plaintiff until after payment, or whether the short shipment of the 100 bags affected the case. I express no opinion therefore upon either of those points.

But upon the assumption that the decision might be against the plaintiff upon the question whether the goods were his, it was next argued for the plaintiff that although the property had not passed he had yet an insurable interest in the sugar.

But the same default which seems to me to have prevented the passing of the property seems to me also to have prevented his having had any insurable interest.

It was, no doubt, truly said for him that by the terms of the contract and the known course of business any goods duly shipped in accordance with the contract would have been at his risk after shipment.

But in that event he would according to my view have had not only an insurable interest but also property, and the present case is not like that of *Castle* v. *Playford* (1), in which although the property had not passed there was a specific agreement that the goods were to be at the buyers' risk.

Neither does the case of *Sparkes* v. *Marshall* (2) (which was strongly pressed upon me in course of Mr. Myburgh's very able argument) assist the plaintiff, because in that case, although the seller had made default in delivering at Portsmouth according to the contract, the plaintiff had before the loss assented to what was an undoubted appropriation to him and so the property had passed.

But although the plaintiff had not in my judgment either property or insurable interest in "goods," he had, I think, an insurable interest in "profits," for he had contracts binding both Drakes and Beloe by which he was entitled to the delivery of 4000 bags of sugar at Hamburgh, and had sold at a profit which he was clearly unable to realise for want of the goods. Whether this profit was lost by any of the perils insured against it is

(1) Law Rep. 5 Ex. 165; Law Rep. 7 Ex. 98.
(2) 2 Bing. N. C. 761.

1882

STOCK v. INGLIS.

unnecessary for me to consider, for it is now well settled that such a loss cannot be recovered under a policy framed like the present merely on goods: *McSwiney* v. *Royal Exchange Assurance Co.* (1) and *Anderson* v. *Morice.* (2)

I am unable therefore to give the plaintiff judgment.

At first sight this seems to operate harshly on the plaintiff, for he had made a contract to insure and had paid the premium, and may have reasonably believed that he was insured under his floating policy, and so have omitted to effect a fresh insurance.

But it is impossible to blame the defendant for this. He has insured at the ordinary market premium such risk coming within his policy as the plaintiff may choose to declare upon it; if the loss is not covered by it the plaintiff will probably have the opportunity of declaring another which is, and suffering as he no doubt has the loss of this expected profit, he must consider it as due to Drakes' breach of contract in not delivering to him at Hamburgh as they had promised to do, and for this the defendant is in no way answerable, and I give judgment for him with costs.

Judgment for the defendant.

Solicitors for plaintiff: *Hollams, Son, & Coward.*
Solicitors for defendant: *Bubb, Walton, & Bubb.*

(1) 14 Q. B. 634.
(2) Law Rep. 10 C. P. 58; Ex. Ch. 609; Law Rep. 1 App. Cas. 713.

E. L.

IN THE MATTER OF THE BRIGHTON INTERCEPTING AND OUTFALL SEWERS ACT, 1870; AND

IN THE MATTER OF CERTAIN DISPUTES BETWEEN THE BRIGHTON INTERCEPTING SEWERS BOARD AND THE HOVE COMMISSIONERS WITH RESPECT TO CARRYING OUT THE PROVISIONS OF THE ABOVE-MENTIONED ACT.

1882
July 31.

Brighton Intercepting and Outfall Sewers Act, 1870 (33 & 34 *Vict. c. c.*)—*Mandamus to the Judge of the Sussex County Court to hear and determine a Dispute between the Sewers Board and the Hove Commissioners, under s.* 93 *of the Act.*

By s. 93 of 33 & 34 Vict. c. c., an Act the main object of which was the diverting of the sewage of Brighton from the existing storm-outfalls and carrying it to a distance from the town,—it was enacted that, "any dispute which might from time to time arise between the sewers board and any local authority with respect to carrying into effect the provisions of the Act or incidental thereto might, at the instance of either party, be referred to the judge for the time being of the Sussex county court, who should hear and determine such dispute, and whose decision should be final and conclusive."

A dispute having arisen between the sewers board and the Hove commissioners (one of the local authorities) with respect to the mode of carrying out the provisions of the Act, and the sewers board requiring it to be referred to the county court judge:—

Held, that the county court judge was bound to hear and determine the matter, and that mandamus was the proper course to compel him to do so, and not a rule or order under 19 & 20 Vict. c. 108, s. 43,—this not being a matter within his ordinary jurisdiction, but a special duty imposed upon him by statute.

By s. 93 of the Brighton Intercepting and Outfall Sewers Act, 1870 (33 & 34 Vict. c. c.), it is enacted that "Any dispute which may from time to time arise between the sewers board and any local authority with respect to carrying into effect the provisions of this Act or incidental thereto may, at the instance of either party, be referred to the judge for the time being of the Sussex county court, who shall hear and determine such dispute: but he may, if he thinks fit, in the first instance appoint a competent person to make such examinations and inquiries as he shall direct, and to report to him thereon; and the costs, including the costs of all such examinations and inquiries, shall be in the discretion of such judge, and his decision shall be final and conclusive."

Disputes having arisen between the sewers board and the Hove commissioners with respect to the carrying into effect the pro-

1882

RE BRIGHTON SEWERS ACT.

visions of the Act, the sewers board issued a summons in the Brighton county court, and applied to the judge to name a day for hearing the matter. This the judge declined to do unless both parties would consent to his acting as arbitrator. The Hove commissioners declining to agree, and the judge persisting in his refusal, the sewers board, on the 24th of July last, obtained a rule calling upon the Hove commissioners, upon notice to the judge of the county court, to shew cause why the judge "should not hear and determine certain disputes which had arisen between the Brighton Intercepting and Outfall Sewers board and the said commissioners with respect to carrying into effect the powers of the Act, and incidental thereto, and do all such acts as might be necessary for hearing and determining such disputes; or why a writ of mandamus should not issue directed to the judge commanding him so to hear and determine as aforesaid."

Cohen, Q.C., and *Hollams*, shewed cause. This is a matter of very grave importance, involving not only the possible expenditure of a large sum of money, but also the legal construction of the Act: and the Hove commissioners are naturally anxious (as he himself is) that the judge of the county court should be relieved from the responsibility of determining it, and that the questions should be raised in such a manner as to enable them to obtain the ultimate decision of a superior Court.

[FIELD, J. All we are asked to do is, to tell the judge of the Sussex county court to act under s. 93 of the local Act.]

The Court will not grant a mandamus where the party applying for it has an equally convenient remedy without it, and here a remedy is given by s. 33. (1)

(1) Sect. 33 enacts that "the sewers board may and is hereby authorized and required to stop up, remove, or destroy all sewers, pipes, drains, and other works which shall be constructed or laid down, and whereby any sewage matter is conveyed or discharged into the sea contrary to the provisions of this Act; and all costs and expenses incurred by the sewers board in and about such stopping up, removal, or obstruction, with full costs of suit, may be recovered by the sewers board from the local board or other public body or private person who shall have caused the same to be constructed or laid down, or who, having the property in or the power and control over the same, and having been by notice in writing from the sewers board required to stop up, remove, or destroy the same, shall for the space of two weeks after

Finlay, Q.C., in support of the rule. The sewers board has done quite right in adopting this course. There is no reason for suggesting that the county court judge is not equal to the duty which the statute has cast upon him.

SIR J. HANNEN. I can quite understand the anxiety of Mr. Cohen to relieve the county court judge of the responsibility of deciding between these two public bodies: and I should be glad if we could see our way to provide another tribunal for the settlement of these disputes. But we must discharge our duty: and, after all, the question seems to be a simple one. The language of s. 27 is perfectly clear. It enacts that, "when the intercepting sewers are completed and ready for use, the local authorities as to all outfalls into the sea within their respective jurisdictions, and the sewers board as to all outfalls into the sea not within the jurisdiction of a local authority, shall alter all such outfalls then in existence in such manner as to adapt the same for storm-water outfalls only, and so as to divert the sewage therefrom as far as may be into the intercepting sewers, and the sewers board shall lead into the intercepting sewers all sewers except the storm-water sewers which cross the line of the intercepting sewers at any point within the parishes of Hove, Brighton, and Rottingdean, so that the same respectively shall discharge their sewage into the intercepting sewers; and shall at their own expense execute all necessary works for that purpose." The question raised is, whether the alterations have been made in the existing outfalls so as to adapt them for storm-water outfalls only, and so as to divert the sewage therefrom. The legislature has thought fit to create a particular tribunal to decide disputes. It requires the county court judge to hear and determine the matter, if either party desires to refer it to him. It provides a cheap tribunal which is readily accessible: and, whatever doubts the modesty of the learned judge may induce him to entertain, I entertain no

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the receipt of such notice refuse or neglect to do so; and the amount of such costs and expenses shall be in addition to any penalty which such local board, public body, or person may have incurred under the provisions of this Act for causing or permitting or suffering sewage matter to pass or flow directly or indirectly into the sea by means of such sewer, pipe, drain, or other work."

1882

RE BRIGHTON SEWERS ACT.

doubt that he will discharge his duty ably and properly. I do not see how we can deprive the sewers board of a right which the Act of Parliament gives them; and I see no circumstances to induce me to throw impediments in their way. The rule must be made absolute.

FIELD, J. I am of the same opinion. The Act was passed for the benefit of the inhabitants of Brighton and places adjacent; the main object being to secure the health of the locality by diverting the sewage from the storm-water outfalls and carrying it by means of intercepting sewers to a distance from the town. Disputes having arisen between the sewers board and the Hove Commissioners, one of the local authorities referred to in the Act, as to the proper mode of carrying out the provisions of the Act, the sewage board ask us to allow them to have the matter heard and disposed of by the tribunal which the legislature has expressly provided for that puprose. In some cases the magistrates are the tribunal selected for the settling of local differences. Here it is the judge for the time being of the county court. This case is clearly within s. 93; and, as this is not a matter which comes within the ordinary jurisdiction of a county court judge, it is not a case for an order under 19 & 20 Vict. c. 108, s. 43; but the only appropriate remedy is by mandamus commanding the judge to hear and determine the matters in dispute. The rule will, therefore, be made absolute for a mandamus,—the costs of and occasioned by the application to be borne as the judge may direct.

Rule absolute accordingly.

Solicitors for sewers board: *Freeman & Freeman Gell, Brighton.*
Solicitors for Hove Commissioners: *Hill & Co., for Harwood, Brighton*

J. S.

WALL *v.* TAYLOR.
WALL *v.* MARTIN.

1882
Aug. 3.

Copyright—Musical Composition—Dramatic Piece—Place of Dramatic Entertainment—3 & 4 Wm. 4, c. 15, ss. 1, 2—5 & 6 Vict. c. 45. ss. 20, 21.

The sole liberty of performing a musical composition conferred by 5 & 6 Vict. c. 45, ss. 20, 21 (which incorporate the penalty clauses of the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15), upon the author or his assignee, extends to its performance (for payment) at all places of public entertainment, and is not confined to its performance at a place of dramatic entertainment.

The word "dramatic" in s. 1 of 3 & 4 Wm. 4, c. 15, has no particular signification.

WALL *v.* TAYLOR.

THE plaintiff, the assignee of the copyright of a musical composition called "Will o' the Wisp," sued the defendant for the infringement of his right by performing it in "a place of dramatic entertainment" called Bolingbroke Hall, near Clapham Junction, in violation of 3 & 4 Wm. 4, c. 15, ss. 1, 2, and 5 & 6 Vict. c. 45, s. 20, claiming as damages 40*s.*, or "the full amount of the benefit and advantage arising from such representation or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages." He also claimed an injunction.

At the trial before Day, J., at the Trinity sittings at Westminster, it was proved that the song in question was sung or represented by the defendant at the place mentioned, at a public concert held there. In the bills of the performance, Will o' the Wisp, which was a song and recitative, with action, was called a "descriptive song." It had only very recently been purchased by the plaintiff and entered at Stationers' Hall, although the full period of the copyright had nearly expired. There was no evidence that the plaintiff had sustained any injury or loss from the performance.

On the part of the defendant, it was submitted that the song was not dramatic nor the place where it was sung "a place of dramatic entertainment" within the meaning of the statute.

For the plaintiff it was contended that, to give the plaintiff a cause of action for the penalty imposed by the statutes, it was enough that a "musical composition" should be performed at a

1882

WALL v. TAYLOR.

SAME v. MARTIN.

place of public entertainment, where, as here, admission was paid for, and that it need not be a place of "dramatic entertainment."

WALL *v.* MARTIN.

The facts in this case were similar to those of *Wall* v. *Taylor*. The performance took place at the Central School Room at Barton Brow, Over Darwen, Lancashire. No payment was received for admission to the room, but there was a charge of 8*d.* to each person for the refreshment provided, viz. tea.

The learned judge, after reading to them the judgment of Lord Denman in *Russell* v. *Smith* (1) as the best guide for them upon the subject, left it to the jury to say whether Will o' the Wisp was a dramatic piece, and whether the places where it was sung or represented were for the time being places of dramatic entertainment; telling them that, if they found that the hall in the one case and the room in the other was not a place of dramatic entertainment, the plaintiff was not entitled to the penalty given by the statutes; and that, if they found that the defendants had been guilty of an infringement of the plaintiff's copyright, they might give him such damages as they might think him reasonably entitled to under all the circumstances.

The jury found a verdict for the plaintiff in each case, damages 1*s.*; and the learned judge ordered the plaintiff to pay the defendants' costs.

1882. June 13. *T. T. Fillan* obtained a rule to shew cause why a new trial should not be had on the ground of misdirection of the judge, in telling the jury that it was a question for them to find whether Will o' the Wisp was a dramatic piece, and whether the room in which it was performed was "a place of dramatic entertainment" for the time being, and that there was evidence upon which the jury might find that the said piece was not a dramatic piece, and that the hall or room was not for the time being a place of dramatic entertainment, and that, if they found that the room was not for the time being a place of dramatic entertainment, the plaintiff was not entitled to the damages given by 5 & 6 Vict. c. 45, s. 21, and that they (the jury) might find

(1) 12 Q. B. 217.

1882

WALL v. TAYLOR.

SAME v. MARTIN.

for the plaintiff for as small damages as they pleased; and on the ground that the finding of the jury was against the weight of evidence.

June 21, 22. *Cripps*, for the defendant Taylor, and *Wilberforce*, for the defendant Martin shewed cause. They contended that neither was Will o' the Wisp a dramatic piece nor was the place where it was performed or sung a place of entertainment within the meaning of the Acts of 3 & 4 Wm. 4, c. 15, and 4 & 5 Vict. c. 45, and therefore the plaintiff was not entitled to recover the penalties provided by those Acts. *Russell* v. *Smith* (1) was referred to.

T. T. Fillan, for the plaintiff. The object of 5 & 6 Vict. c. 45 was, to give to the author of a musical composition the same protection and remedy as had already been given by 3 & 4 Wm. 4, c. 15, to the author of a dramatic piece; and the remedy is not confined to its performance at a "place of dramatic entertainment," but extends to a *public* performance at any place. Penalties were recovered under similar circumstances before Lindley, J., in *Adams* v. *Margate Pier Co.* (2), and before Manisty, J., in *Wall* v. *Harris*. (3)

Cur. adv. vult.

The judgment of the Court (Field and Cave, JJ.), was delivered by

CAVE, J. These are two actions brought by the assignee of the author of a musical composition or song called "Will o' the Wisp," against the defendants, to recover damages for the performance by them of such musical composition at a place of public entertainment; and the question in these cases is, whether the sole liberty of performing a musical composition conferred by 5 & 6 Vict. c. 45, s. 20, on the author thereof extends to the performance of such musical composition at all places of public entertainment, or is confined to its performance at a place of dramatic entertainment. It has, indeed, been argued that at both the entertainments in question pieces of a dramatic nature were

(1) 12 Q. B. 217. (2) 12 Q. B. 217; 15 Sim. 181.
(3) Not reported.

1882

WALL v. TAYLOR.

SAME v. MARTIN.

represented, so as to give to the entertainments the character of dramatic entertainments. But we think it better to give our decision upon the more important question first stated.

Previous to 1833 the liberty of performing dramatic pieces was not the subject of property; but by 3 & 4 Wm. 4, c. 15, after reciting that it was expedient to extend the provisions of 54 Geo. 3, c. 156, relating to copyright in printed books, it was enacted that the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, or his assignee, should have as his own property the sole liberty of representing or causing to be represented at any place of dramatic entertainment any such production not printed and published by the author or his assignee, and should be deemed and taken to be the proprietor thereof for the term therein mentioned. Sect. 2 enacted that, if any person should during the continuance of such sole liberty represent or cause to be represented, without the consent in writing of the author or other proprietor, at any place of dramatic entertainment any such production, or any part thereof, every such offender should be liable for each and every such representation to the payment of an amount not less than 40*s.*, or to the full amount of the benefit and advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages, to the author or other proprietor of such production.

By 5 & 6 Vict. c. 45, s. 20, after reciting that 3 & 4 Wm. 4, c. 15, was passed to amend the law relating to dramatic literary property, and that it was expedient to extend to musical compositions the benefit of the Act in recital and also of that Act, it was enacted that the provisions of 3 & 4 Wm. 4, c. 15, and of that Act, should apply to musical compositions, and that the sole liberty of representing or performing or causing or permitting to be represented or performed any dramatic piece or musical composition should endure and be the property of the author thereof and his assigns for the term therein mentioned. Sect. 21 provided that the person who should at any time have the sole liberty of representing such dramatic piece or musical composition should have and enjoy the remedies given and provided in

3 & 4 Wm. 4, c. 15, during the whole of his interest therein as fully as if the same were re-enacted in that Act.

In *Russell* v. *Smith* (1) the same question which we have now before us arose, but was not decided. It was, however, held in that case that a room in which a dramatic piece is performed, and to which persons paying for tickets are admitted for the purpose of hearing it, is for the time a place of dramatic entertainment within the meaning of the statutes, although the room is ordinarily used for different purposes; or in other words, that the epithet "dramatic" in the clause "place of dramatic entertainment" has in 3 & 4 Wm. 4, c. 15, no particular signification.

In the present case it is contended that the words "place of dramatic entertainment" in the earlier statute are incorporated in the later one, and that the right of performing musical compositions given by that Act is confined to the right of performing them in places of dramatic entertainment. No sensible reason was, or, as it seems to us, could be given why the right of performing a musical composition thus given should be so limited. The object of the statute seems to be that one man shall not make money by performing a musical composition of which another person is the author, without the leave of the author; and it is to us impossible to conceive any ground for a distinction between performing the musical composition at a place of dramatic entertainment or at a place of entertainment of any other kind. The 5 & 6 Vict. c. 45, s. 20, gives to the author or his assigns the sole liberty of performing a musical composition, and does so, as was pointed out in *Russell* v. *Smith* (2), without repeating in terms the reference contained in the former Act to a place of dramatic entertainment; and the subsequent provision in the same section, that the first public performance of a musical composition shall be deemed equivalent to the first publication of any book, seems to us to point out the true restriction which we ought to adopt, and to shew that the right of representing a dramatic piece or performing a musical composition which is by these statutes conferred on the author is the right of representing or performing them *in public*.

If, as is contended by the defendants, the right of performing

(1) 12 Q. B. 217. (2) 15 Sim. 181.

1882

WALL v. TAYLOR.

SAME v. MARTIN.

musical compositions given by these statutes is restricted to the right of performing them at a place of dramatic entertainment, and if, as the jury have found, the places where these songs were performed were not places of dramatic entertainment, the judgment should in each case have been entered for the defendant; for, the proprietor of a musical composition has no other right of performing them than that given by the statute. But if, as we think, the right conferred is the right of performing them in public, the plaintiff was entitled to a verdict for 40*s.* in each case: and, as there are no facts in dispute which render a new trial necessary, judgment must now be entered for him for that amount in each action, with costs, including the costs of this application.

Judgment for the plaintiff.

Solicitor for plaintiff: *T. Lewis Allen.*
Solicitors for defendant Taylor: *Wilkinson & Howlett.*
Solicitor for defendant Martin: *G. Lewis.*

J. S.

1880
June 7.

[IN THE COURT OF APPEAL.]

FORWOOD *v.* THE NORTH WALES MUTUAL MARINE INSURANCE COMPANY.

Insurance (Marine)—Policy and By-laws, construction of—Constructive total Loss—Insurance confined to "Absolute Damage caused by the Perils insured against."

A policy of marine insurance effected by the plaintiff with the defendants, a mutual insurance company, incorporated certain by-laws of the company indorsed thereon. The policy (inter alia) expressed it to be thereby declared that the acts of the assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment. One of the by-laws provided that in the event of any ship being stranded or damaged, and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company should be deemed, or taken to be, an acceptance or recognition of any abandonment, of which the assured might have given notice to such company, and the company under any circumstances should only pay for the absolute damage caused by the perils insured against, which was in

no case to exceed the sum insured. The plaintiff's vessel was, while the policy was in force, damaged by perils of the sea to such an extent that the cost of repairing would have amounted to more than the ship would have been worth when repaired. The plaintiff within a reasonable time gave notice of abandonment:—

Held, that a constructive total loss was covered by the policy and by the by-laws, and that the plaintiff could maintain an action.

APPEAL by the defendants against a judgment of Lush, J., in an action upon a policy of marine insurance on ship in respect of a constructive total loss. The facts are fully stated in the report of the proceedings before the Queen's Bench Division (1), and they may be gathered also from the above headnote.

Gorell Barnes (*Sir F. Herschell, S.G.*, with him), for the plaintiff.

Russell, Q.C., and *Trevelyan*, for the defendants.

BRAMWELL, L.J. I think that this judgment must be affirmed. We cannot listen to any argument as to what the intention of the framer of the by-laws may have been. The policy is valued, and primâ facie includes both an actual and a constructive total loss. If it was not intended to include a constructive total loss, it would have been better to say so in express terms. The policy provides that the acts of the assurer or the assured in recovering, saving, or preserving the property insured shall not be considered a waiver or acceptance of abandonment. From these words it is plain that the parties contemplated that an abandonment might be made. But the defendants have relied also on the by-laws: it seems to me plain that the policy and the by-laws must be read together. By the 24th by-law it was provided that no acts of the defendant company or its agents, under or in pursuance of the power thereby reserved to the company, should be deemed or taken to be an acceptance or recognition of any abandonment, of which the assured might have given notice to the company. It must be admitted that if this clause had stood alone, the doctrine as to constructive total loss would clearly apply to the policy and the by-laws; but it has been contended that the subsequent words of the 24th by-law shew that there cannot be an abandonment and

(1) 5 Q. B. D. 57.

1880

FORWOOD v. NORTH WALES INSURANCE COMPANY.

that there cannot be a constructive total loss which will render the company liable: if that construction of the subsequent words cannot be made out, the defendants must fail. The subsequent words are as follows: "The company, under any circumstances, shall only pay for the absolute damage caused by the perils insured against, which in no case is to exceed the sum insured." The defendants must shew that these words necessarily exclude a constructive total loss; but it is plain that the words cannot have a merely literal acceptation, they cannot be taken literally so as to include only a partial loss: the company upon their own construction of the policy must pay in the event of the ship insured going to the bottom of the sea: it is not true that under any circumstances the company shall only pay for the absolute damage caused by the perils insured against to the vessel insured. The words relied upon cannot cut down the liability imposed by the general clause of the policy. But it has been also contended that even if the 24th by-law may apply to some cases of constructive total loss, such as embargo and capture, yet it does not apply where, although the ship has been damaged, as for instance by tempest or by stranding, she nevertheless exists in specie and is capable of being repaired. Why should not the clause have an operation in every case of constructive total loss? There is nothing to shew that it is to be cut down in some cases and not in others. In order to have the effect contended for, the clause relied upon ought to have been put in a different place: it comes in at the end of a long series of by-laws, which are intended to regulate the rights of the parties. I do not know, and I will not pretend to say, whether Brett, L.J. is altogether right in his view of the case; but when I consider that this is a valued policy and that the power of abandonment is an ordinary incident to the contract of marine insurance, I cannot help coming to the conclusion that that power ought not to be taken away except by express words.

BAGGALLAY, L.J. I agree in thinking that this appeal ought to be dismissed. It was no doubt contemplated by both parties to the assurance that everything should be done which tended to limit the liability of the company; but the defendants have gone

further and have contended for an interpretation which would exclude a case of constructive total loss even by stranding. I do not think that this argument can be maintained. The 24th by-law has three clauses: the first is general in its terms, but its operation is limited to pointing out what is to be done on the occurrence of a loss: it is material as to the mode of procedure. The second clause confers upon the directors power to take certain steps; and the third clause provides that none of those steps shall be taken to amount to any distinct acceptance or recognition of an abandonment. This shews that a constructive total loss is not to be excluded from the policy. The burden is cast upon the defendants to shew that the claim of the plaintiff is excluded. The construction urged upon their behalf is utterly inconsistent with itself: they wish to cut down the meaning of the clause, and to utterly reject it so far as it can apply to a constructive total loss where the ship remains in specie. Unless the defendants can shew that this third clause has only a limited application, they must fail. They cannot shew that it has a limited meaning, and therefore the judgment must be affirmed.

BRETT, L.J. In the result the first question is whether there can be a constructive total loss under the by-laws and the policy. It is impossible to say that the by-laws can be left out of consideration in construing the policy; that mode of interpretation has not been contended for: the by-laws must overrule the policy. Whatever may be the true construction of the last clause in the 24th by-law, it must be read in harmony with the immediately preceding clause which necessarily recognises a constructive total loss; therefore the last clause cannot be treated as excluding a loss of that kind. It has been urged that under the policy and the by-laws there cannot be a constructive total loss of a ship which has been merely damaged by perils of the sea, and which is in safety and in the hands of her owners. I cannot assent to this view; for to adopt it would require the introduction of new clauses into the by-law. The last clause does not apply to a total loss; it is difficult to say to what it does apply. We have not quite solved the difficulty as to the construction of the last clause; and I do not entirely accept the view of Lush, J. I think, however,

1880

FORWOOD v. NORTH WALES INSURANCE COMPANY.

that the other portions of the 24th by-law clearly contemplate that there may be a constructive total loss, for which the company will be liable.

Judgment affirmed.

Solicitors for plaintiff: *Waltons, Bubb, & Waltons.*
Solicitors for defendants: *Forshaw & Hawkins.*

J. E. H.

1882
June 9.

[IN THE COURT OF APPEAL.]

MILLER *v.* PILLING.

Practice—Official Referee—Form of Report—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 56, 57.

A referee under the Supreme Court of Judicature Act, 1873, s. 57, is not bound to give his reasons for his findings; he may simply find the affirmative or the negative of the issues, and the issues in an action cannot be sent back to him for re-trial or further consideration merely on the ground that his report does not set out the reasons for his findings.

10 QBD 332
335-6
1 QBD 180
185.

THIS action was brought to recover a sum of 1407*l.* 13*s.* 6*d.* and interest thereon, for services rendered by the plaintiff to the defendant, a contractor, and for money expended in getting a sub-contract for making a railway transferred from certain other contractors called Taylor, Cameron, & Co. The plaintiff also claimed 12,000*l.* as damages for breach of an agreement by the defendant to give to the plaintiff 1000*l.* of the stock of the company, in consideration of the plaintiff guaranteeing certain sums of money to be advanced by the National Bank of Scotland. The plaintiff also claimed a sum of 450*l.* and interest thereon, which he had been compelled to pay to the bank under his guarantee, but which the defendant had not repaid. There was also a claim in respect of several unpaid bills of exchange.

The defendant, by his pleading, denied the various allegations made by the plaintiff; and he further set up a counter-claim, which contained, first, a claim for repayment of certain expenses incurred with respect to certain plans and estimates relating to the railway; secondly an allegation that the plaintiff had made fraudulent misrepresentations to the defendant as to the prospects

of the line, in order to induce him to enter into the contract, so that the plaintiff was liable for the whole of the losses sustained by the defendant; and, further, that the plaintiff, by handing the plans and estimates relating to the railway to the defendant, had entered into a contract that the plans and estimates had been prepared with reasonable skill and care. The defendant claimed 25,000*l.* for debt and damages, and prayed that the plaintiff might be declared trustee of the bills of exchange for the defendant.

The action came on for trial before Field, J., who under the Supreme Court of Judicature Act, 1873, s. 57, ordered that the issues of fact in the cause, and the question of account arising therein, should be tried by one of the official referees. In accordance with the order of the learned judge the official referee tried the issues of fact, and made a report in which he found the issues of fact in favour of the plaintiff in the terms in which those issues were raised in the pleadings. Upon motion for judgment made by the plaintiff the defendant objected to the form of the report, and also to the findings of the official referee on the ground that they were against the weight of evidence. Field, J., made an order sending back the action to the referee for re-trial and further consideration; the learned judge was of opinion that it was the duty of the official referee to set out the grounds and reasons upon which he had arrived at the conclusions in his report.

The plaintiff appealed.

May 13, 17; June 6. *Bompas, Q.C.* (*Brynmôr Jones*, with him), for the plaintiff. This is a reference under the Supreme Court of Judicature Act, 1873, s. 57, and an official referee is in the position of a jury, and his findings must be dealt with as a verdict: *Sullivan* v. *Rivington*. (1) Under Rules of the Supreme Court, Order XXXVI., rule 34, he has power to submit any question for the consideration of the Court, and this shews that it is not compulsory to state every question which arises in the course of the hearing: *Dunkirk Colliery Co.* v. *Lever*. (2)

Horne Payne, and *Bower*, for the defendant. Upon motion for judgment every kind of objection may be urged. It is true that this is a reference under s. 57, but it is difficult, owing to the form

(1) 28 W. R. 372. (2) 9 Ch. D. 20, at p. 28, per Bramwell, L.J.

1882

MILLER v. PILLING.

of the report, to say what the official referee has found. It was proper to send back the report in order that the official referee may explain his meaning.

Bompas, Q.C., did not reply.

BRETT, L.J. The first point to be determined is the meaning of the order of Field, J.; it is express in its terms, and is in effect an order for a re-trial. In the course of his judgment, he stated his wish that the official referee should hear further argument and take further consideration of the matters before him. It is evident that the learned judge thought that the findings might be altered; he did not require a mere explanation. The official referee is in effect told to re-try and re-hear the case: under the terms of the order he might hear the evidence over again. The true meaning of the order is that there is to be a new trial of the issues.

The question then arises whether any ground exists for supporting the order. It has been admitted upon both sides that the order has been made, not under the Supreme Court of Judicature Act, 1873, s. 56, but under s. 57. When any matter is sent to an official referee under s. 56, he is to return a report which may be wholly or partially adopted by the Court; but under s. 57 the questions to be sent to the official referee are not such as may only partially determine the matters in dispute; but the issues of fact are to be tried: that means that the issues in the cause, the issues of fact such as are ordinarily tried by a jury, are to be determined by the official referee. Therefore, if in an action there are issues of fact, the Court may order them all to be tried by the official referee. He must report his conclusion to the Court; but it is equivalent to the verdict of a jury. Upon a reference to him he has to put his report into the same state as a jury had to do when they found a special verdict: the judgment, however, is to be given by the Court. Although the findings of the official referee are to be equivalent to the verdict of a jury, the learned judge has in the present case taken an objection to them. The official referee has reported his findings in a particular form, and possibly that form may not be the most convenient. He has given categorical answers to certain allegations in the pleadings. The learned

judge in fact wants the reasons to be stated for the findings; he wants data upon which he may found a particular judgment. I have said that the findings of an official referee are equivalent to the findings of a jury; but I doubt whether he can be guilty of mis-direction; how can he mis-direct himself? Upon a proper motion the evidence may be brought before the High Court, as in the case of an ordinary trial before a jury. If, however, the findings can be set aside on the ground of misdirection, it is only by shewing that on no ground can they be supported. I do not think that the learned judge could lawfully object to the form of the report: the official referee is not bound by law to put his findings into a different shape; he might have made his report shorter, but perhaps it is as well that he should not give his reasons on the face of his report. I cannot agree with the view of Field, J.: if he did not understand the findings, he might have asked for an explanation or for reasons under Order XXXVI., rule 34. We must consider whether the findings can be set aside: the view of Field, J., was that explanations must be given on the face of the report. If it could be shewn that the findings of the official referee were against the weight of evidence, they might be set aside; and it is said that the finding that there was no fraudulent misrepresentation, and that the alleged misrepresentation was not acted upon, is against the weight of evidence: a court ought to be careful how it deals with a finding, whereby a man is absolved from fraud; it is not so material where he is convicted. There is in my opinion no ground for setting aside the findings; some criticisms were brought against them in the course of the argument, but they were such as would set aside any finding of fact. I think that the facts found by the report must be acted on, and that the order sending it back must be set aside.

COTTON, L.J. This is an appeal from an order sending back the report to the official referee. One of the principal contentions by the defendant was that the official referee could not merely negative the allegations in the pleadings. The material enactments to be considered are ss. 56, 57, of the Supreme Court of Judicature Act, 1873. This is a reference under s. 57. A report made under s. 56 may be wholly or partially adopted by the

1882

MILLER v. PILLING.

Court; but a finding as to issues of fact under s. 57 must be dealt with as the verdict of a jury; it may, however, be set aside, if it is shewn to be against the weight of evidence. In my opinion, the official referee is not bound to set out the steps by which he has arrived at his conclusions: it is unnecessary for him to do so; he has only to find the ultimate issues of fact. If he were bound to state all the circumstances, what would he be bound to do in cases of account? It would do away with the utility of references, if it were necessary for the official referee in every case to state his reasons. In my opinion the form of the report cannot be objected to under Order XXXVI., rule 34: the official referee can be asked his reasons; but in order to set aside the report it must be shewn that he decided upon a wrong view of the law. Here the case is sent back for re-trial and re-consideration. The question is whether the findings are so far against the weight of evidence that we are bound to set them aside. I think that they are not. There was sufficient evidence to support them. The order of Field, J., must be set aside.

Brynmôr Jones, for the plaintiff, prayed that judgment might be entered in accordance with the findings of the official referee.

Bower, for the defendant, objected that as only two Lords Justices were present, final judgment could not be entered: Supreme Court of Judicature Act, 1875, s. 12.

PER CURIAM. The case must stand over until three judges are present, when final judgment will be entered.

June 9. *Bompas, Q.C.*, for the plaintiff, prayed that judgment might be entered for the plaintiff.

Bower (*Horne Payne*, with him), for the defendant. There is a preliminary objection to entering judgment in this case; the plaintiffs ought to apply to the Queen's Bench Division: Order LVIII., rule 17. The order of Field, J., was only interlocutory; it was not the final judgment in the cause; that has never been pronounced in the High Court of Justice, and this Court has no power to do so at the present stage.

Bompas, Q.C., for the plaintiff. It is for this Court to determine whether the order appealed from was interlocutory; this Court

has full power to determine what is and what is not interlocutory: Supreme Court of Judicature, 1875, s. 12.

1882

MILLER v. PILLING.

PER CURIAM (Lord Coleridge, C.J., Brett and Cotton, L.JJ.). We will pronounce the judgment which ought to have been delivered in the Queen's Bench Division, and that is, judgment for the plaintiff in accordance with the official referee's report. So far as we are concerned, the defendant may, if he is so advised, contend before the House of Lords that no final judgment has been pronounced in this case.

Judgment for the plaintiff.

Solicitors for plaintiff: *Faithfull & Owen.*

Solicitors for defendant: *Coombe & Wainwright, for R. Hankinson, Manchester.*

J. E. H.

[IN THE COURT OF APPEAL.]

1880

June 29.

THE QUEEN *v.* SHEWARD.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18)—*Compensation—Matter not legally the subject of Compensation—Application to quash Inquisition—Certiorari, Writ of—Discretion.*

Application having been made to the High Court of Justice for a writ of certiorari, to bring up and quash the proceedings upon an inquisition before the sheriff as to the amount of compensation to be awarded to a claimant under the Lands Clauses Consolidation Act, 1845, on the ground that the jury in assessing the compensation had taken into consideration matters which were not legally the subject of compensation; it was proved that the applicants for the writ had allowed five months to expire without taking any objection to the proceedings:—

Held, that as the time allowed for setting aside an award made under the provisions of the above-mentioned Act had expired before the application was made, the writ of certiorari ought not to be granted.

APPEAL by the Metropolitan and St. John's Wood Railway Company against the discharge of a rule for a writ of certiorari, to bring up the proceedings taken before the sheriff of Middlesex with respect to a claim for compensation under the Lands Clauses Consolidation Act, 1845.

The facts are fully stated in the report of the judgment in the Queen's Bench Division. (1)

(1) 5 Q. B. D. 179.

1880

THE QUEEN v. SHEWARD.

Mr. Sheward, the claimant, had a leasehold interest in certain premises on which he trained and exercised steeplechase horses and hunters. The railway company had power to take these premises compulsorily by virtue of their special Act which incorporated the Lands Clauses Consolidation Act, 1845. In December, 1875, the company gave the usual notice to treat, and in February, 1879, an inquisition was taken before the under-sheriff of Middlesex, when the jury assessed the compensation at 6000*l.*, which included a large sum for loss in respect of the claimant's business. The claimant's costs were taxed and paid in April, 1879. Some correspondence ensued, in the course of which the claimant's solicitors pressed for payment, and ultimately, on the 11th of June, issued a writ to recover the sum of 6000*l.* The company moved for the rule for the certiorari on the 21st of July, 1879.

Bidder, Q.C. (*L. E. Pyke*, with him), for the company. The under-sheriff allowed the jury to go beyond their jurisdiction; for they gave compensation for damage to the claimant's business. It must be admitted that no formal objection was made at the hearing either to the evidence or to the summing up.

Sir H. James, A.G., for the claimant, was not called upon to argue.

BRAMWELL, L.J. I think that this appeal must be dismissed. The granting of a certiorari is discretionary, and the claimant has been guilty of nothing misleading. The company must take the consequences of the delay; perhaps they congratulated themselves under the belief that the proceedings before the under-sheriff were invalid and of no use. I have grave doubt whether the inquisition was wrongly taken: I think in fact that it was rightly taken. I shall not go into this question at length, for in the view which I take it is immaterial. The land of the claimant was worth 6000*l.* for the purposes of his business, and that has been taken from him by the company. A difficulty might have arisen from the decision in *Brand* v. *Hammersmith Ry. Co.* (1), but in that case no land of the plaintiffs was taken. I think that mischief has arisen from the judgments in *Vaughan* v. *Taff Vale Ry. Co.* (2)

(1) Law Rep. 4 H. L. 171.

(2) 5 H. & N. 679.

and *Rex* v. *Pease* (1); it would be strange if a claimant could get compensation in one case and not in another. I may mention also that I doubt whether the High Court has jurisdiction to quash an inquisition which is good upon the face of it.

The judgment of the Queen's Bench Division must be affirmed.

BAGGALLAY, L.J. I am of the same opinion. The Queen's Bench Division appears to have laid down a rule of practice, that a certiorari ought not to be granted for the purpose of quashing an inquisition taken under the Lands Clauses Consolidation Act, 1845, after the expiration of the time allowed for setting aside an award made under the powers of the same Act; that circumstance would be sufficient to dispose of the present case. I certainly see no reason for dissenting from the law as laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (2); in *City of Glasgow Union Ry. Co.* v. *Hunter* (3), what the claimant complained of was done elsewhere than on the land taken from him by the company; and in *Brand* v. *Hammersmith Ry. Co.* (4), the company had not taken any land belonging to those who claimed compensation.

BRETT, L.J. The Queen's Bench Division appears to have exercised its jurisdiction upon a general rule which it has laid down; and this ground is sufficient to dispose of the present case. As to the question whether the claimant is entitled to compensation for the loss to his business, I should have wished for an opportunity of further discussing it, if it had been necessary to decide it; but I may say that I have a strong opinion as to what our decision would have been. I think that the opinions of the Law Lords in *Duke of Buccleugh* v. *Metropolitan Board of Works* (2) draw a great distinction between the cases where land of the claimant for compensation has been taken, and those where no land has been taken; if this be the correct view, every part of the evidence adduced at the hearing of the inquisition was free from objection. The only ground of complaint which could have been urged was that a misdirection had occurred, but that is a

(1) 4 B. & Ad. 30.
(2) Law Rep. 5 H. L. 418.
(3) Law Rep. 2 H. L., Sc. 78.
(4) Law Rep. 4 H. L. 171.

1880

THE QUEEN v. SHEWARD.

matter into which we cannot now inquire. In my view there was no excess of jurisdiction.

The appeal must be dismissed on the ground that the rule for a certiorari was not moved for in proper time.

Judgment affirmed.

Solicitors for claimant: *G. M. Allen & Son.*

Solicitors for company: *Burchells.*

J. E. H.

1882

May 15.

[IN THE COURT OF APPEAL.]

BROWN *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company — Mileage Charges—Lump Charges—Statute—Repeal by Implication—Government Duty—"Tolls"—Omission to put up Milestones —Railways Clauses Consolidation Act, 1845, *s.* 95.

The W. Company by their original Act were authorized to charge reasonable rates for the conveyance of passengers. By a subsequent Act the company were empowered to extend their line, and to charge a lump sum for carrying passengers over that extension. A third and later Act allowed the W. Company to amalgamate with another company, provided that they reduced their charges to the same scale as that of the other company. That scale was one penny a mile for each third-class passenger. The plaintiff travelled over the line of the W. Company with a third-class ticket, and was charged as his fare at more than the rate of one penny a mile. In the course of his journey he travelled over the extension. The W. Company also charged the plaintiff with the government duty:—

Held, that the W. Company were not entitled to charge the plaintiff more than one penny per mile, but that they were entitled to charge him with the Government duty.

By one of the clauses in an Act relating to the W. Company they were forbidden to take tolls, unless milestones were maintained along the line; and another Act relating to the W. Company incorporated the Railways Clauses Consolidation Act, 1845, which, in s. 95, contains a similar provision:—

Held, that the word "tolls" related to tolls properly so called, and did not extend to charges for carrying passengers in the company's own carriages.

SPECIAL CASE stated pursuant to a master's order.

The plaintiff on the 6th of November, 1880, applied at the defendants' station at Paddington for a third-class passenger ticket from Paddington to Bristol, and the plaintiff tendered the sum of 9*s.* 10*d.* for the ticket. The defendants' booking-clerk declined to issue the ticket unless upon payment of the sum of

10*s.* 6*d.*, being the defendants' usual charge for similar tickets. This sum the plaintiff paid under protest, and he thereupon received a ticket and travelled by the defendants' train from Paddington to Bristol.

The plaintiff on the 4th of November, 1880, applied at the defendants' station at Bristol for a third-class passenger ticket from Bristol to Paddington, and the plaintiff tendered the sum of 9*s.* 10*d.* for the ticket. The defendants' booking-clerk declined to issue the ticket unless upon payment of the sum of 10*s.* 6*d.*, being the defendants' usual charge for similar tickets. This sum the plaintiff paid under protest, and he thereupon received a ticket and travelled by the defendants' train from Bristol to Paddington.

The distance from Paddington to Bristol and from Bristol to Paddington was agreed to be 118 miles and a fraction of a mile less than half a mile. On the 6th of November, 1880, there were milestones between Paddington and Bristol, but no milestone or post or other object at the 118th mile from Paddington or at the quarter mile after that.

The trains by which the plaintiff travelled ran on six days in every week: they were ordinary and not express trains. They did not stop at every ordinary passenger station; they were not market trains. The defendants did in November, 1880, run one train each way daily on every week-day in accordance in all respects with the Cheap Trains Acts (7 & 8 Vict. c. 85 and 21 & 22 Vict. c. 75), and no passenger duty was claimed from or paid by them in respect of such parliamentary or cheap trains. The sum of 10*s.* 6*d.* for the journey between Paddington and Bristol was at a rate greater than one penny a mile.

The questions for the Court were whether the defendants were entitled to charge, first, for the fraction of a mile beyond 118 miles as for one mile; secondly, for passenger duty the amount charged by the government; thirdly, the special charge authorised by 1 Vict. c. xcii. ss. 42, 43.

1881. Nov. 5, 30. *The plaintiff in person.*

R. E. Webster, Q.C., and *R. S. Wright*, for the defendants.

The arguments are sufficiently stated in the judgments.

1882

BROWN v. GREAT WESTERN RAILWAY CO.

FIELD, J. This is an action brought to recover back from the Great Western Railway Company either the whole or a portion of two sums, which the plaintiff has paid in respect of his being carried by the company from Bristol to London and back again. The facts were that on a certain day he went by the third-class, and travelled from Bristol to Paddington, and this fare was 10*s.* 6*d.* He paid the money under protest, and then he also had a return journey for exactly the same fare, which he also paid under protest. He made an application to the Railway Commissioners for a prohibition calling upon the Great Western Railway Company to discontinue receiving more than the maximum fare, which they were authorised to receive. The commissioners proposed to entertain it, but on an application to this Court, my Brother Manisty and I, who were sitting here, considered it was beyond their jurisdiction, and we granted a prohibition, which has been upheld in the Court of Appeal. (1) We pointed out in our judgment that the proper remedy for the present plaintiff was to come to a court of law if he had any complaint to make. The plaintiff has followed our suggestion, and has proceeded to bring an action against the company to recover what he says are overcharges in respect of the two journeys which he has made. He seeks to recover either his whole fare or else such portion of it as may amount to an overcharge. Now, the distance is about 118½ miles from Paddington to Bristol, and it turns out that at the time when the fare was taken there was no milestone at the 118th mile, nor was there a milestone at the quarter of a mile beyond the 118th mile. The train in question was an ordinary train, it ran six days a week, it did not stop at every station, and was not a market train. The point has not been raised about its being a cheap train, or if it was raised it was abandoned.

The first question does not seem to have been stated, but the facts raise it, and we are anxious to go into everything, so that the plaintiff and the company may have our judgment upon every point. The question was whether, in consequence of the absence of the stones or posts at the 118th mile and at the quarter of a mile beyond, the railway company were justified in making any

(1) 7 Q. B. D. 182.

charge to anybody. The consequences would have been very serious if we had been compelled to hold that the company were debarred from making any charge; but we think that the circumstance that there were no milestones at those two points does not prevent the railway company from recovering the fares which they would otherwise be entitled to. As the plaintiff has pointed out, in a clear and sensible argument while commenting upon the original Great Western Act of 1835 (5 & 6 Wm. 4, c. cvii.), the legislature in passing the early railway Acts did not foresee what the future of railways was to be. It was at that time thought that railway companies were to make their profit by charging for other persons' trains, or by allowing other persons' engines and trains to run upon their lines, and the consequence of that was that the Great Western Company have most minute provisions as to their maximum fares in the original Act, all of which, with one exception, are applicable to that supposed use of the railway. But it has turned out in practice that that system could not be worked. I recollect that it was tried in the midland counties. I recollect the mine owners trying to compel the Manchester, Sheffield, and Lincolnshire Railway Company to allow them to run their engines to carry coal, but, as there were no facilities for getting water or for the stoppages of trains, and as there were no pointsmen or other servants, it was found utterly hopeless to do anything else than allow the company to carry the coal in their own trucks in their own manner, and for this reason, that the person who has the command of the undertaking is the best person, and the person most likely to carry on the business carefully. The railway companies, immediately the Acts came into operation, became carriers themselves, and the legislature had foreseen that that might happen, because as well as the maximum clause for tolls and rates they had inserted a clause that the companies might carry for themselves, and they imposed upon them the ordinary liabilities of carriers, that is, that they were to carry at reasonable charges. That was how the matter stood at the time when the Act of 1835 and the Act of 1837 (1 Vict. c. xcii.) were passed.

The consequence of this state of matters was that there were, as it were, two series of provisions in the Act, one affecting what

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Field, J.

is called the use of the railway and the other affecting the carrying by the company of passengers and goods over the railway as carriers, and it is important to keep that distinction in mind for the purpose of the decision which we are called upon to pronounce. The ground on which Mr. Brown relies for claiming to have back the whole of his fare is that by the 177th section of the Act of 1835 (5 & 6 Wm. 4, c. cvii.) the legislature has said that the company shall paint a list of the tolls and fares on boards. In s. 173, after enacting that in all cases where there shall be a fraction of a mile, a fraction of a mile shall be deemed a quarter, the legislature has added that to ascertain with greater facility what the amount shall be, the company shall put milestones at every quarter of a mile. There is also a provision with the like object that they shall paint their tolls on boards at certain places. That is s. 177. Then comes s. 178, upon which the plaintiff founds his case, which prohibits the company from taking any rates or tolls for any article or passenger so carried or conveyed along the railway, except during the time the boards and stones shall be painted and affixed. That was the private legislation. There are other clauses which shew what the object of that was, but they do not affect the particular question. Besides the private legislation there also was passed a well known Act of general legislation, which is the Railways Clauses Consolidation Act, 1845. It would seem reasonably clear, I think, that as regards the local Act the prohibition of receiving tolls and rates was by the very language of the Act limited to tolls and rates such as are fixed by the statute, and did not extend to the reasonable charges which the company as carriers were entitled to make. It was limited to the tolls and rates which they were about to charge for the purpose of conveying other persons' carriages either with or without their own locomotives. Mr. Brown very properly seeks to found his case upon that general Act as well as upon the private Act. The general Act is 8 & 9 Vict. c. 20, and it contains various sections which it will be advisable to refer to. The first material enactment is s. 90. There is a series of sections beginning with s. 86, and the series goes down below those which we have to deal with. The railway companies may employ locomotive power and contract with

other companies; they are not to be liable beyond the liability of carriers. Sect. 90 says that a railway company may vary their tolls, but they must be charged equally. Then s. 92 says, "It shall not be lawful for the company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods, than they are by this and the special Act authorized to demand; and upon payment of the tolls from time to time demandable all companies and persons shall be entitled to use the railway." I refer to those words particularly, because they will be found later on in the section which the plaintiff cites in support of his claim for relief. Then comes the provision that the list of fares or tolls is to be painted on a board, and then comes this provision, s. 94: "The company shall cause the length of the railway to be measured, and milestones, posts, or other conspicuous objects to be set up and maintained along the whole line thereof, at the distance of one quarter of a mile from each other, with numbers or marks inscribed thereon denoting such distances." Now comes the clause on which the plaintiff relies in support of his case, s. 95, "No tolls shall be demanded or taken by the company for the use of the railway during any time at which the boards hereinafter directed to be exhibited shall not be so exhibited, or at which the milestones hereinbefore directed to be set up and maintained shall not be so set up and maintained." In the present case the plaintiff was not a person using the railway in the sense in which those words are used. He was being carried by the company in their capacity of carriers. The consequence of that is, first of all, that he did not come within the sections of the local Act, and with regard to the general Act we think also he does not come within that. The words are, "No tolls shall be demanded or taken by the company for the use of the railway." If that stood by itself, it might be that we should have held that the toll there mentioned was still only the toll or rate which was referred to in the local Act; but the plaintiff properly said, "No, that is not so; because if the definition clause of the Railways Clauses Consolidation Act, 1845, is looked at, it will be found that the word 'toll' has a larger meaning than that." He says it has that larger meaning in s. 95, and he founds that upon

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Field, J.

s. 3, the definition clause, which defines "tolls" thus: "The word 'toll' shall include any rate or charge or other payment payable under the special Act for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway." But then it must be recollected that that meaning is given subject to the preamble, if I may use the word, of that section, and that is in these words: "The following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction." Therefore before we can give to the word "toll" the large and broad meaning which it is competent to give it under the definition clause, we have to look at the words of the section in which it is used and see whether there is anything in the subject or context repugnant to the construction contended for, and we think that there is. We think that the words in s. 95 are repugnant. If the word "toll" stood by itself it might not be so, but the toll is to be "for the use of the railway." On principle, therefore, if we had to construe this Act for the first time, that would have been our decision, but we think also that the case is covered by authority as well. The authorities are to the following effect. I think that the earliest case that was cited on the part of the company was the case of *Garton* v. *Bristol and Exeter Ry. Co.* (1). In that case the point raised was with regard to the boards, but it turned upon the local Act of Parliament and not upon the Railway Clauses Consolidation Act, 1845, and therefore it is only an authority as to the extent of the construction which was put upon the sections of the local Act of Parliament. The next case was *Wallis* v. *London and South Western Ry. Co.* (2) There the question did not arise under s. 95 as this one does, but it arose under s. 97, which says this: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to retain and sell such carriage, or all or any part of such goods." And the Court of Exchequer in that case held that carriers' charges were not tolls within the meaning of the 97th section, and they arrived at that construction by holding that the 97th section must be read together with the 95th, 96th, and all the series of sections applicable to it. Conse-

(1) 30 L. J. (Q.B.) 273. (2) Law Rep. 5 Ex. 62.

quently the 97th section must be read as if the words "for the use of the railway" had been included in it. Now a similar question very soon afterwards arose in the Scotch Courts, and the first case that arose was a case under the corresponding section to the 97th, and it was taken for granted that "tolls" did include carriers' charges as well as charges for the use of the railway. Then later on in a case which occurred afterwards, the *Caledonian Ry. Co.* v. *Guild* (1) the Court expressed its disapproval of the decision in *Wallis* v. *London and South Western Ry. Co.* (2); but then it limited that disapproval to this point, that it thought the Court of Exchequer had gone wrong in holding that the 97th section was to be read in conjunction with the 95th section, so as to alter its construction. It was distinctly held under the 88th section of the Railway Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), corresponding to the 95th section of the Railways Clauses Consolidation Act, 1845, that the words "for the use of the railway" had that meaning, and consequently if the Court of Session had had to decide the question under the 88th section, which is the one that corresponds with the 95th section, it would have been decided it differently; but the Court only had to decide it under the 90th section of the Scotch Act, and it was held that the 90th section in this Act was separable from the 88th, and therefore it was held that the company had the lien which they claimed to have in respect of their carriers' charges. Therefore we have come to this result, that upon principle the meaning of the legislature is clear, that this prohibition to receive tolls only applies to cases where the person who claims to travel free is using the railway by his own carriages, and does not apply to the case where the traveller is carried as a passenger. I may mention that 8 & 9 Vict. c. 20, is incorporated by 10 & 11 Vict. c. ccxxvi. s. 2, hereafter commented upon.

In construing Acts of Parliament, we must look at what was the object of the legislature. It was supposed that persons would travel up and down the railway with their own engines and carriages, and the legislature thought it well, in order that there should be no dispute as to the tolls to be paid, that the persons using the railway should be able to see how much they were.

(2) 1 Sc. Dec. (4th Series), p. 198. (2) Law Rep. 5 Ex. 62.

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Field, J.

Perhaps the legislature thought it well that ordinary passengers should have the same facility, but if they did think so they have not said so, and we cannot import words into the Act. They have used language which does not apply to the present case. Upon that first point, therefore, we decide against the plaintiff. We decide that the absence of the mile post at the 118th and 118¼ miles did not prevent the company making charges for carrying passengers, and therefore the plaintiff cannot recover back from them the fares paid by him.

The second point arises in a remarkable manner. The Great Western Railway Company, by their scheme of 1835, were not to come to London itself. They stopped short at Acton. At Acton they had the advantage, as they thought at that time, of saving 5½ miles by effecting a junction with the London and North Western Railway, which company had previously got their bill. At that time the powers which they took were powers to run and join the London and North Western Railway at Acton, that being from Bristol a distance of 113 miles. Two years afterwards they found out the hopelessness of being able to carry all the traffic of the west and the traffic of the north into one station, and they determined to make the additional piece of line from Acton to Paddington. In 1837 they obtained that authority from Parliament which enabled them to fill up the remaining 5½ miles (1 Vict. c. xcii.). Their original Act contained the scale of charges they were entitled to make, and it is to be remarked it was the ordinary scale; they had a regular scale of charges fixed. The new Act which gave them the extension into London did not give them a scale of charges, but what it did was this. By the preamble to one of the sections (41), it is stated, what of course would be the fact, that this bit of line was very expensive to make: the company had to come through property of a very valuable character and ought not to be put upon the same scale of tolls as exists in respect of the 113 miles; and the short result of it was that the legislature allowed them to charge a lump sum not to exceed two shillings for the whole distance of the 5½ miles (s. 43.) The plaintiff does not dispute that if that Act had not been repealed the company would have been justified in charging even more than they have charged, but he says that

that Act has been repealed. That is the question which we have to decide. He does not say it has been expressly repealed, but he relies upon the well known principle of law, that if an Act of Parliament is passed containing clauses which are repugnant to and inconsistent with prior legislation, the legislature cannot have two minds at one and the same time, and therefore the subsequent mind must alter the first mind. Therefore, if even in an affirmative Act there is a clause which is repugnant to and inconsistent with a previous Act, the two cannot stand together; the subsequent Act repeals the prior Act, and, à fortiori, when it is negative. It seems to me that these Acts may be considered as negative; the Act of 1835 enacts that anybody may travel, but the company shall not charge him more than is reasonable. The Act of 1837 provides that any person may travel 5½ miles, and the company shall not charge him more than two shillings, that shall be a maximum charge. Later, the Great Western Railway Company proceeded on their voyage towards Liverpool as far as they could get, and they got hold of the Birmingham and Oxford and the Birmingham and Dudley lines and the lines of other railway companies. The Great Western Company could take them only upon a term, which the legislature seems to have put in some of the bills. It was this, that they should not be allowed to exercise their powers or carry out their amalgamation with the Birmingham and Dudley Junction unless they consented to reduce their tolls to the same scale of charges as that of the Birmingham and Dudley Junction (10 & 11 Vict. c. ccxxvi.) s. 47. The plaintiff contends that the effect of that is to repeal this lump maximum of two shillings over the 5½ miles of railway. We have come to the conclusion that he is right. What is the language of the Act? It is that the tolls to be charged shall be reduced to the same scale as those of the Birmingham and Oxford Junction. The counsel for the defendants urged with great ability that this provision could not refer to the lump charge. It is contended that there is a scale in 5 & 6 Wm. 4, c. cvii., but there is no scale in 1 Vict. c. xcii., for the company is allowed a charge of 2*s.*, and no scale is given. It is contended upon this ground that the legislature cannot have meant to abolish it. The statute 1 Vict. c. xcii. is recited, and

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Field, J.

there is no express repeal. But after all the general intention of the legislature seems to me to be quite clear. There was a company, originally a modest company, going only to Acton; afterwards it goes into London, and afterwards it has branches throughout the west of England. Then it becomes the great undertaking which we now know as the Great Western Railway Company, and then comes 10 & 11 Vict. c. ccxxvi., which the plaintiff relies upon, and which says that this great undertaking called the Great Western Railway is to have a uniform charge. I think that was the meaning and intention of the legislature. Under those circumstances it seems to me that the plaintiff is very well founded in his contention, and that that 2*s.* charge is no longer payable since that Act was passed. It seems to me inconsistent with the meaning of that Act that the defendants shall be entitled to charge this lump sum of 2*s.*, especially when it is remembered that that Act insisted on the Great Western Company reducing their tolls to the rates charged on the Birmingham and Oxford Junction, and if this sum of 2*s.* were charged it would give them a considerable sum beyond that. This disposes of the second point.

We have now to consider the third point, which is how much they are entitled to charge for? The absolute distance from Paddington to Bristol is over 118 miles. The earliest legislation said that for every fraction of a quarter of a mile they might charge a quarter of a mile. The distance is 118 miles and something over a quarter and less than a half; the question which we thought important to be argued was, whether it being over 118 miles, it was not equal to 119 miles. The company say, and say truly, they are entitled to charge for a fraction of a mile as a mile. Those are the enacting words of the 51st section of 10 & 11 Vict. c. ccxxvi. which was the Act which reduced the tolls, and in that very Act the legislature said, whilst reducing the tolls to the Birmingham and Dudley Junction rate they still permitted the company to charge a fraction of a mile as a mile. We therefore think the total distance to be calculated on the Great Western Railway from Paddington to Bristol is 119 miles. The result of that is this, that the company being entitled to add the government duty they pay, Mr. Brown has been overcharged

to the extent of a fraction more than three farthings each way. Therefore the judgment is for 2*d.*, but he is entitled to 2*d.*, and 2*d.* we must give him.

NORTH, J. I take the same view, and I wish very shortly to state the way in which it strikes me.

As regards the question about the milestones under 5 & 6 Wm. 4, c. cvii., certain clauses refer to the taking of charges. A distinction is recognised by the Act itself between the rates and tolls which are charges for conveyance in carriages not belonging to the company on whose lines the articles or things are being conveyed on the one hand, and the charges for conveyance by that company where they are acting as carriers on the other hand. Now, as regards the question of the milestones, s. 173 provides that in any case where there is a fraction of a ton conveyed, or the distance for which an article or a person is conveyed is less than a mile, the fractions are to be charged for, and a provision is made for the purpose of ascertaining the distance for which rates or tolls are to be demanded, and the company are to put up and maintain milestones at every quarter of a mile. That has not been done in this case. Then s. 178 provides that it is not lawful for the company to demand or take any tolls or rates unless the milestones with the proper inscription thereon, which are directed to be set up every quarter of a mile, are kept in their places. That applies to rates and tolls only, and does not apply to the case in which charges are being received, that is to say, it does not apply to a case like the present of a person being conveyed by the company themselves along their own line. That seems to me clear from the construction of those clauses and also from the decision of the Court of Queen's Bench in *Garton* v. *Bristol and Exeter Ry. Co.* (1) Upon this point reference was made to the Railways Clauses Consolidation Act, 1845, which deals with a similar matter in somewhat different terms, and of course, it might be under that Act that certain duties were imposed upon the company which did not exist before. We decide in the defendants' favour as regards their Act, but that public Act has also received judicial decision in *Wallis* v. *London*

(1) 30 L. J. (Q.B.) 273. 5 Jur. N.S. 1244

1882

BROWN v. GREAT WESTERN RAILWAY CO.

North, J.

and South Western Ry. Co. (1), and the same conclusion was arrived at there on that Act, s. 95 of which corresponds to s. 178 of the defendants', and it was there decided that the section applies merely to cases where persons or goods are being conveyed by other persons than the company upon the line, and not to where the persons or goods are being conveyed by the company itself. That disposes of the milestone question, which does not apply to the second point in this case.

Now, the second question is with respect to the 2*s.* charge by the defendants. That stands shortly in this way: by s. 47 of 10 & 11 Vict. c. ccxxvi., a reduction of tolls and charges is contemplated so as to compel the Great Western Railway Company to equalise their rates, tolls, and charges with those of another railway company. Then s. 49 says, what are to be the maximum rates charged by the Great Western Railway Company, and in the case which we are now dealing with, the maximum rate of charge made by the company for the conveyance of passengers along their railway is, for every passenger conveyed in a third class carriage by any such train as the plaintiff was being conveyed by, the sum of 1*d.* per mile. The argument on behalf of the company, when reduced to its simple element, was this, that by reason of some other Act they had power to charge not only a penny a mile, but any other sum they pleased not exceeding two shillings. That seems to me to be directly inconsistent with the terms of this Act, where it says the maximum charge shall be a penny a mile for the conveyance of passengers in third class carriages in a train, which is not an express train. It seems to me if that does not directly repeal the previous Act, which says that a charge of two shillings may be made, the effect would be to make the sum charged by the company more than the maximum charge.

The third and the only remaining point is with respect to the fraction of a mile. As to that, as I understand, the plaintiff's argument is, that inasmuch as certain other companies whose charges were the same as those made by the Great Western Railway Company, or rather to whose level the Great Western Railway Company's charges were to be reduced, did not charge

(1) Law Rep. 5 Ex. 62.

as much as a penny for a fraction of a mile by reason of 9 & 10 Vict. c. cccxv., the Great Western Railway Company are bound to reduce their charges to the same level. I do not follow that argument, and I should require to know more about it before deciding in the plaintiff's favour upon that point. But even if he is right in that, what I do find is this, that even if under 9 & 10 Vict. c. cccxv., the company could only charge for a full mile, by 10 & 11 Vict. c. ccxxvi. s. 51, the Act of the following session, they are clearly empowered to charge for any fraction of a mile beyond six miles, or beyond any greater number of miles as for one mile. Therefore, if the two provisions of the two successive years are inconsistent, what we are bound to do is, not to follow the plaintiff's invitation and to say, because the later Act is inconsistent with the earlier Act, the later Act is to be rejected, but to say if the later Act is inconsistent with the earlier Act the earlier Act is to be rejected. The later Act seems to me to be clear upon the point, and to entitle the company to demand and take the toll for a whole mile instead of a fraction of a mile.

Judgment for the plaintiff for 2d.

The defendants appealed, and the plaintiff gave a cross notice of appeal.

1882. May 15. *Webster, Q.C.*, and *R. S. Wright*, for the defendants in support of the appeal.

The argument is sufficiently stated in the judgments.

The plaintiff in person was not called upon to argue.

JESSEL, M.R. I think that the judgment of the Queen's Bench Division must be affirmed. The decision turns upon a very small point. The simple question is, what is the meaning of the term "the Great Western Railway," when used in the Act of 1847. An Act was passed in 1835, in which there are rates and tolls. The first section to be referred to is the 163rd, which provides that any person may use the railway on payment of the rates and tolls. By the 164th section the company were entitled to take a toll strictly so called, that is, a toll from persons using their own carriages and locomotives; that relates to goods; and in s. 165

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Jessel, M.R.

there was a similar power to take tolls for passengers, beasts, cattle, and animals. The 166th section empowered the company to provide locomotive power for those persons who supplied their own carriages and waggons, and as regards the locomotive power they were to supply it on any terms they thought proper. It had nothing to do with a mileage rate. Then by the 167th section the company were authorized to be carriers, and to provide both locomotive power and carriages, and they were not limited to charges, except that they were to make reasonable charges, and that they were not to charge for the conveyance of passengers more than 3½*d.* a mile. The next Act of Parliament to which it is necessary to refer was to enable the company to extend their line from Acton to Paddington (1 Vict. c. xcii.), and it is called "An Act to enable the Great Western Railway Company to extend their line." The first clause enacts that every provision referring to the railway shall, except such as have been repealed, extend and be construed to extend to the new piece of line, and then it empowers the company to make the extended piece of line; and by the 41st section it is enacted that "whereas the company will incur a great additional expense in extending the said railway to Paddington," they shall be entitled to charge for that five and a half miles of the line in lieu of the rates authorized to be demanded by the first-recited Act, lump-tolls, as they were called, for the whole distance. The 43rd section entitles the company to make a reasonable charge for supplying locomotive power; but I take it that by s. 43 the right of the Great Western Railway Company to act as carriers between Acton and Paddington is clear beyond question, that is, they might make any charge they thought fit to make or could get paid, subject to the limit as to passengers. The result appears to me, looking at the Acts as they stand, to be this, that the Great Western Railway main line was extended to Paddington, that as to the part of the line between Acton and Paddington the company had a right to charge a lump sum for toll not exceeding 2*s.* for a passenger, any sum that might be reasonable when they supplied locomotives, but that as regards the rest of the line they were limited as to tolls and rates. I believe the fact to be that in strictness the mileage charges never came into existence, and

that the company from the beginning acted as carriers. Under the provisions of the Act they were to charge what was reasonable, with the limit as to passengers. It must be borne in mind that there was no other limit at that time on the rate of charges when they acted as carriers; practically there was no limit.

Matters being in this state, an Act of Parliament was passed to enable the Great Western Railway Company to amalgamate themselves with two other railway companies, on the terms that their tolls should be reduced. Recollecting what I have said, we must turn to the other Acts. The Great Western Railway had power to charge what they thought reasonable as carriers, and they had then the power to charge mileage rates. Therefore if the argument were to prevail that this provision applies only to tolls which can be charged according to mileage, it would not affect the Great Western Railway Company, because they always acted as carriers. But it is plain to my mind that it applies to the whole line, and that the provision was introduced to prevent the company, even when acting as carriers, from charging what they like. The words of the section relied upon (10 & 11 Vict. c. ccxxvi. s. 47) appear to me reasonably to that effect. It recites that the companies are not to amalgamate, unless and until the tolls and charges on the Great Western Railway shall have been reduced to a scale not exceeding the tolls and charges authorized for the lines. For tolls there was a maximum, but for charges there was none. They might charge anything that was reasonable when they acted as carriers, and anything which might be agreed upon when they furnished locomotive power. When I say "anything reasonable," of course I mean that the law would make a carrier charge a reasonable sum. It is provided by s. 47 that "the scale of tolls and charges by this Act authorized to be demanded and taken on the Great Western Railway shall be," &c. I have no doubt that this expression means the whole line from Paddington to Bristol. No other description is to be found anywhere. It is not a mere inference. The piece of the line from Acton to Paddington is nowhere called by any other name, and I have no doubt that that is the proper meaning of the term. The section provides for a reduction in the scale of tolls and charges, and it is then enacted by a negative clause, "that from and after

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Jessel, M.R.

the transfer of the said undertaking or any part thereof to the Great Western Railway Company, it shall not be lawful for the Great Western Railway Company to demand and receive in respect of the use of the Great Western Railway and the branch railways by this Act authorized to be made by parties using the same, either with their own carriages and engines employed by them thereon, or with their own engines only (in cases where the company as hereinafter provided may consent to supply carriages)." certain tolls which are mileage tolls. Then s. 48 provides that "the toll which the company may demand for the use of engines for propelling the carriages of other parties on the said railway shall not exceed" a mileage rate. So that we have a mileage rate substituted for that which was not a mileage rate. Sect. 49 provides that "the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the said railways and of carriages, and for locomotive power and every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums." That is a carriers' charge, and that carriers' charge was a mileage charge on the other railways, but was not a mileage charge on the Great Western Railway. Is it to be said that it is not to apply to the whole of the Great Western Railway? The argument, if it is worth anything, goes too far, because as it was not a mileage charge on any part of the Great Western Railway, the company would be left out altogether, and as in practice they acted only as carriers, it would have no effect upon them. That appears to me impossible, and the section must mean to restrict the charge of the company as carriers to the same charge as the other railway companies could make as carriers. I entirely agree with the decision of the Queen's Bench Division, and on consideration of the statutes I think it as clear a case as ever I have seen.

BRETT, L.J. I think that it cannot be denied that if the two phrases in 10 & 11 Vict. c. ccxxvi. ss. 47, 49, "in respect of the use of the Great Western Railway" and "the said railway" include the line from Acton to Paddington, each of those two sections deals with the sums which may be paid under the Act of

1837 as a lump sum in respect of the conveyance of passengers between Acton and Paddington. If those two phrases include that part of the line, then inasmuch as there is that enactment in the Act of 1837, although the lump sum is there called a toll, and certainly is a rate or charge, in s. 47 that toll is included, although it is a lump sum, and in s. 49 that toll is included in the words "rate or charge." That view was hardly contested. Mr. Webster's contention was that the part of the line between Acton and Paddington was not in s. 47 included within the term "the Great Western Railway" and was not in s. 49 included in the term "the said railway." Therefore his argument was that the term "the Great Western Railway" really means only the Great Western Railway from Bristol to Acton, although he admits that it includes more than the original Great Western Railway. It includes everything that has been amalgamated with it, whatever the name was before, and the only part of the whole system that he desires to exclude from that term is the piece between Acton and Paddington. Where is it that this term "the Great Western Railway" first appears? In truth, it first appears in the title of the original Act, which is "An Act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called 'the Great Western Railway.'" I do not think that any section in the Act says that that shall be the name of the railway, but it seems to me that it is treated throughout the whole Act as the name of the railway, which was thereafter to belong to the Great Western Railway Company (s. 1). If that was the name of the railway under the Act of 1835, what is the name of the railway which was dealt with, or rather constituted by the Act of 1837? The very first section recites the title of the Act of 1835. It recites that it was "An Act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called 'the Great Western Railway.'" Then it goes on to enact that all the powers, authorities, provisions, matters, and things contained in the said recited Acts shall be construed to extend to this Act. If it was a provision, as I think it was, of the Act of 1835, that the railway thereby constituted should have the name of the Great Western Railway, I think that under those words that provision was carried on by the Act of 1837 and

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Brett, L.J.

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Brett, L.J.

applied to the railway constituted by it, which was the original railway extended from Acton to London. So that by the very first section of the Act of 1837, the Great Western Railway is extended to and forms that part of the line which goes from Acton to London, and it makes the whole one line. Moreover, if there had been nothing to the contrary, all the powers which were given to the railway company with regard to the line to Acton are given to them in respect to the line from Acton to London, and if there had been nothing to the contrary in the Act of 1837 it seems to me that they would have been entitled to apply the same tolls to the new part of their line, as they were entitled to demand in respect to the former part, because the new line would have become part of the old line. But then came the 41st and following sections in the Act of 1837, which limited or rather altered that power and gave another, and these sections show exactly what the legislature meant; the legislature in effect said that in lieu of exercising the powers over this part of the line given by the first Act, the company should in respect of that part be entitled to charge a specified maximum rate. The line was treated as one line. Upon the construction of that Act there were for all parts up to Acton certain rates, there was for the use of that part of the line from Acton to London a fixed sum. If it be true that in that Act the whole part up to London is to be called "the Great Western Railway," it seems to me to follow that in every part of the Act of 1847, where reference is made to "the Great Western Railway," it includes this part from Acton to London. As I said before, it is admitted that that term includes everything else, even the two railways which the company were enabled to purchase and amalgamate with by that very Act: it includes them, and includes everything which the company had incorporated or amalgamated with before; yet it is said that the phrase does not include this particular piece from Acton to London. Upon consideration of the whole matter it seems to me that that cannot be the true construction, and therefore that the reference to the "Great Western Railway" includes the distance from Acton to London; and if that is so, it is hardly contended that the uniform charge given by 1 Vict. c. xcii., is not included both in s. 47 and in s. 49 and abolished by them.

1882

BROWN v. GREAT WESTERN RAILWAY CO.

COTTON, L.J. The question which we have to consider is whether the Great Western Railway Company are still entitled to charge the sum which they were allowed to charge under the Act of 1837 for carrying passengers from Acton to London, and that turns upon the construction of certain sections of the Act of 1847, beginning at the 47th and going down to the 49th.

As I understood the argument addressed to us on behalf of the company, it was contended that the object of those sections was to alter the mileage rate existing under the original Act of the Great Western Railway Company, and therefore when a charge was made, not under a mileage scale, but under the power of an Act giving the railway company a right to charge a lump sum for passengers carried only a hundred yards on the particular line of railway, that power is not taken away by the section. Undoubtedly the object was to amalgamate the scales, but that might have been done by providing that after the amalgamation the mileage scale of the Great Western should be that which had been the scale of the other railway company with which they were about to be incorporated, or at least of which they were about to take a transfer. But the enactment does not stop there. There is a special provision that after the amalgamation not only shall the mileage scale be the same, but the Great Western Railway Company shall not charge more than a certain sum for the carriage of passengers over their line. That was ambiguous, and the only way in which, as it seems to me, the counsel for the company could get out of s. 49 was by saying that the railway there referred to did not include the bit of railway between Acton and Paddington. In my opinion they cannot so restrict the words of s. 49. The bit of railway between Acton and Paddington had been constituted, as Brett, L.J., has pointed out, under the Act of 1837, giving them power to extend their line of railway, that is, the line of the Great Western Railway Company. The line of the Great Western Railway Company up to that time had been the Great Western Railway and when Parliament gave them power to extend their line without calling it by any particular name, in my opinion it is rightly described as, and must be included within, and becomes part of, "the Great Western Railway;" and consequently, the express provision in s. 49, that the

1882

BROWN v. GREAT WESTERN RAILWAY CO.

Cotton, L.J.

company shall not charge more than the sum therein specified for carriage over the railway, will not allow the special provision of the Act of 1837 to remain in force over what is in my opinion part of the Great Western Railway, which must come within the description in the Act of Parliament of "the said railway," that is "the Great Western Railway," as defined in s. 47. In my opinion the decision of the Queen's Bench Division was right.

The cross-appeal then came on for argument.

The plaintiff in person, in support of the cross-appeal, contended, first, that the defendants were not entitled to charge a passenger by their line with the duty payable by them to the government in respect of his fare, and as to this he cited the *Attorney General* v. *London and North Western Ry. Co.* (1); secondly, that inasmuch as two of the milestones between Bristol and London had not been maintained by the defendants, they could not lawfully demand any fare from him for carrying him as a passenger.

Webster, Q.C., and *R. S. Wright*, for the defendants, were not called upon to argue.

JESSEL, M.R. I agree with the decision in the Queen's Bench Division. The 5 & 6 Wm. 4, c. cvii., s. 178, as to the maintenance of milestones applies only to "tolls" properly so-called, and by 9 & 10 Vict. c. ccxxvi., s. 49, the defendants are clearly empowered to charge for government duty; the words are "the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the said railways and of carriages and for locomotive power and for every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums." The words of the statute are decisive.

BRETT and COTTON, L.JJ., concurred.

Judgment affirmed.

Solicitor for defendants: *R. R. Nelson.*

(1) 5 Ex. D. 247.

J. E. H.

THE QUEEN (ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF MADELEY UNION) *v.* THE GUARDIANS OF THE POOR OF BRIDGNORTH.

1882
Aug. 4.

Poor—Removal of Pauper Wife and Children—Settlement—Derivative Birth—39 & 40 Vict. c. 61, s. 35—Divided Parishes Act, 1876.

An order for the removal of a pauper wife and of her three legitimate children, aged respectively five years, three years, and one year, to a union on the ground that the settlement of her husband was the birth settlement of his father within the union, having been made and appealed against, the birth settlement of the husband's father in the union was proved, but no other settlement, either of the husband or of his father, being set up, the order was quashed by the Court of quarter sessions:—

Held, that under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35, the wife took the settlement of her husband, and as it could not be shewn what settlement the children derived from their parent "without inquiring into the derivative settlement of such parent," such children should be deemed to be settled in the parishes in which they were respectively born; and that the Court of quarter sessions were right.

RULE calling on the prosecutors to shew cause why an order of sessions, upon appeal against an order of removal, should not be quashed.

An appeal against an order of justices for the borough of Bridgnorth for the removal of Ellen Hughes and her three children, aged five years, three years, and one year, respectively, from the Bridgnorth Poor Law Union to the Madeley Poor Law Union, as containing the parish of their last place of settlement (1), was tried at the quarter sessions for the borough of Bridgnorth before the Recorder, who quashed the order subject to the opinion of the Queen's Bench Division on the following

CASE.

The grounds of removal alleged that the settlement of the paupers and of William Hughes, the husband of Ellen Hughes, was the birth settlement of John Hughes, the father of William Hughes. No other settlement either of John Hughes or of William Hughes was set up affirmatively by the appellants in

(1) In the order Ellen Hughes was described as the wife of William Hughes, and the parish of Madeley in the Madeley Union was adjudged to be the last legal settlement of her and her said children.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

their grounds of appeal, nor did they therein allege that John Hughes had derived a settlement from his father, or had acquired any other settlement than such birth settlement, as aforesaid, before his son, William Hughes, had attained the age of sixteen; but they alleged that William Hughes was not born, nor ever legally settled in parish of Madeley, and in their fourth ground of appeal they maintained "that the alleged settlement (if any) of the said William Hughes would be a derivative settlement, and as such is abolished by Act of Parliment."

The Court held that upon the reasonable construction of the grounds of appeal the respondents were not bound to prove more than the birth of John Hughes in the parish of Madeley, and that upon such proof the question of law intended to be raised by the appellants would properly arise.

It was proved or admitted on the trial that John Hughes was born in the said parish in the appellants' union in or about the year 1822, and acquired no settlement in his own right, that William Hughes was the lawful son of John Hughes, and also had acquired no settlement in his own right, and that the paupers, Ellen Hughes and her three children, were the lawful wife and children of William Hughes, and had become chargeable to the respondents' union.

The appellants called no evidence at the close of the respondents' case, but submitted as matter of law that it was not sufficient for the respondents to prove the place of birth of John Hughes, but that unless they could shew affirmatively a legal settlement of John Hughes at Madeley not derived from the fact of his birth there, his son William Hughes must be held to be settled in the place in which he, William Hughes, was born.

The Court quashed the order on the ground that it was in law insufficient to make out a primâ facie birth settlement for John Hughes, and that as the respondents had not established a settlement in the parish of Madeley for John Hughes, other than a primâ facie birth settlement, William Hughes must be held to be settled in the parish of his birth by virtue of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61). (1)

(1) By 39 & 40 Vict. c. 61, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate,

If the Court should be of opinion that the facts admitted and proved did not establish a settlement for William Hughes in the parish of Madeley, then the order of removal aforesaid was to be quashed, and the order of sessions confirmed; but if the Court should be of opinion that the facts admitted and proved established a settlement for William Hughes in the parish of Madeley, then the said order of removal was to stand confirmed, and the order of sessions quashing the same to be quashed.

F. A. Bosanquet (*R. L. Kenyon*, with him), shewed cause. It must be admitted that in cases on the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), s. 35, it has been decided that the word "child" applies retrospectively. Here the settlement of John is the basis of the order of removal. But it is only a primâ facie settlement, and would be displaced by a derivative one. The general scheme of s. 35 is the abolition of derivative settlements: *Woodstock Union* v. *St. Pancras*. (1) "No person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise." That is, no Court shall deem that anyone has acquired a derivative settlement. Then follow the exceptions, viz. "except in the case of a wife from her husband." That means "except in the case of" a pauper who offers to derive as wife a settlement from her husband. In her case the Court shall deem that she takes his settlement. So in the case of a child under the age of sixteen. "In the case of" means when a child under sixteen has to be dealt with. It shall be deemed to have derived a settlement by parentage. But

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or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(1) 4 Q. B. D. 1.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

not so if the derivative settlement of the parent would have to be inquired into to shew the settlement of the child. This construction may sometimes cause hardship, but will only do so in rare cases.

In the present case the wife of William Hughes is said to derive the settlement of his father. But the wife takes her husband's settlement. What is his settlement? He is a person who cannot be "deemed to have derived a settlement from any other person," and no settlement of the husband within the Madeley Union has been proved. The children would take their settlement from their father, but that cannot be shewn "without inquiring into the derivative settlement of such parent."

[FIELD, J. What cases are against your construction?]

Perhaps *Great Yarmouth* v. *City of London* (1), in which it was held that the wife of a man who had, while under the age of sixteen and before the passing of the Act, derived a settlement from his father, took this derivative settlement of her husband and not his birth settlement; for the settlement which a son while under the age of sixteen derives from his father is excluded from the operation of the section so far as it abolishes derivative settlements. Notwithstanding the difficulty of the section the judgment is only three lines, viz. "The words of the section are clear. A child under sixteen is within the exception. The pauper's husband therefore took the settlement of his father."

In *Westbury-on-Severn* v. *Barrow-in-Furness* (2) a pauper, born in 1841, who had while under sixteen and before the Act derived a settlement from his father retained it, being within the exception to the Act. The Court say in effect, we are dealing with a person who took his settlement when a child, although he was forty-one when the question arose. Here the person dealt with is the father.

[CAVE, J. That case seems to decide only that s. 35 is retrospective.]

It may be retrospective, but the words must receive their natural meaning and the retrospection must not be unlimited. The *Guardians of Hollingbourn* v. *Guardians of West Ham* (3) was

(1) 3 Q. B. D. 232. (2) 3 Ex. D. 88.

(3) 6 Q. B. D. 580.

"the case of" a child under sixteen and having a widowed mother. Such child was before the Court.

[CAVE, J. referred to *Woodstock Union* v. *St. Pancras.* (1)]

Archibald (*Jelf, Q.C.*, and *Spearman*, with him), in support of the rule. The question as to the wife is concluded by *Great Yarmouth* v. *City of London.* (2) The construction suggested would separate the mother and children and therefore be contrary to the policy of the law of settlement. The point really under discussion in this case is the settlement of the father. If s. 35 ended with the second clause the argument for the Madeley Union might be correct. But the third clause shews that questions arising as to the derivative settlement of a parent of the pauper were contemplated. The third clause however only applies "to children under sixteen not falling within the first clause," per Lindley, J.: *Guardians of Hollingbourn* v. *Guardians of West Ham.* (3) "Any child," in the third clause, means any child an orphan or over the age of sixteen or emancipated, and not a child under sixteen living with its mother. Therefore the children in question not being within the third clause take the settlement of their father although derivative: *Westbury-on-Severn* v. *Barrow-in-Furness* (4); *Reg.* v. *Guardians of Hereford Union.* (5)

Cur. adv. vult.

FIELD, J. This was a special case stated by the Court of quarter sessions of the peace for the borough of Bridgnorth, upon an appeal by the union of Madeley against an order by which two justices had upon the 9th of January, 1882, adjudged the last place of settlement of Ellen the wife of William Hughes and three children, aged five years, three years, and one year, to be in the parish of Madeley. The Madeley Union or parish had appealed against that order and the Court of quarter sessions quashed it subject to a case.

The question turns upon the construction of 39 & 40 Vict. c. 61, s. 35. The paupers were the wife and three children of William Hughes, the birthplace of William Hughes was not

(1) 4 Q. B. D. 1.
(2) 3 Q. B. D. 232.
(3) 6 Q. B. D. 580, at page 582.
(4) 3 Ex. D. 88.
(5) 43 J. P. 335.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Field, J.

proved, and was assumed to be elsewhere than in Madeley Union, but his father John was born in Madeley, and the justices below held that the settlement of John the grandfather of the paupers ought to be considered the settlement of William, and upon that ground made the order. The statute has been discussed in various cases and in one or two of them I have expressed my opinion as to its true construction. Upon those occasions I had not taken time to consider, but I stated the construction which appeared to my mind to be the true one. Since then other cases have been decided, and in the very able argument that has been addressed to us in this case by Mr. Bosanquet those cases have been fully brought before us. I thought it right therefore to look into the subject ab initio, and see whether or not the view I had before expressed was correct, or whether an examination of the statute and authorities would enable me to acquiesce in Mr. Bosanquet's view. For that purpose I have gone further back than the statute in order to trace as far as I can the policy of the legislature. There is no doubt but that by law every person unable from poverty to maintain himself is entitled to be maintained at the expense of the inhabitants of some parish or place which has the duty thrown upon it of maintaining its own poor; and that place is charged with the liability, and every other place in which a person is found who is likely to become chargeable to the funds for the relief of the poor in it, has a right given to it of causing the removal of a person likely to become chargeable to what is popularly known as his or her place of settlement. That right of removal of poor persons existed before the pauper settlement laws. It was in existence so long ago as the reigns of Richard II. and Henry VII. (1), in which various Acts of Parliament were passed requiring that poor persons or persons of certain descriptions should resort to certain places; and it is remarkable in how much modern legislation agrees with the first legislation on the subject, because the whole spirit of the Acts of Richard II. and Henry VII. was that persons of certain descriptions should resort to the places in which, in the language of the Acts, they had become conversant, or had dwelt or abided. Therefore the policy in those days was to hold that the proper place for a

(1) See 12 Rich. II. c. 7; 11 Hen. VII. c. 2; 1 Ed. VI. c. 3.

vagrant or person not having means of support was the place where he was conversant and where he would find friends or persons likely to support him or associate with him. That continued to be the state of the law down to the time of Charles II. when the Act was passed which defined the law of settlement, and which law continued until recent changes were effected by this Act, and in one instance by the Poor Law Act of 4 & 5 Wm. 4. The statute of 13 & 14 Car. II. c. 12, fixed the right of removal of persons likely to become chargeable to, and consequently their place of settlement was deemed to be in, the place where the paupers were "last legally settled." The pauper might have been settled in a dozen places, but the place where he was "last legally settled" was to be the one to which he was to be removed, and therefore it became technically known as "the place of settlement." The persons we have to deal with in the present case, who are to be removed, are a married woman and three children, all the children being under the age of sixteen and of course unemancipated, and if any question had arisen about the removal of these four persons before the statute which we have to construe, viz. 39 & 40 Vict. c. 61, s. 35, the wife, so far as she is concerned, would have been removed to the place of her husband's settlement, because she derived that settlement from him. Such would have been the state of things before 39 & 40 Vict. c. 61, and is so still, because although that Act intended to abolish, and did abolish, derivative settlement in general, it excepted a wife from such abolition, and therefore left the law as it was before upon that head. Therefore, in any view, the wife must be removed to the place of her husband's settlement. The policy seems to be that it is undesirable to separate husband and wife, and that if her derivative settlement by marriage were abolished she would have had to go to her place of birth, for women, as a rule, rarely have acquired any settlement of their own, the probability being that a large percentage of married women have no other than the derivative settlement of their husbands or birth settlements. In a great majority of cases, therefore, if the wife were sent to her birth settlement it would be a different place from the husband's settlement, and the effect

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Field, J.

would be at once to separate them. It is also important to observe that the tendency of all modern legislation upon this subject has been to increase the facility of gaining a settlement. In this very Act which we have to construe the legislature has shewn its intention of reducing removeability and fixing the settlement as much as possible at the last place where the pauper has been conversant, by converting the status of irremoveability of three years into a settlement, and his wife presumably would go to that settlement, that is to say, would go to the place where she had been recently dwelling, and therefore it would be a place probably much better for her to be removed to than the place of her birth (which she may have left for many years, and where possibly all her friends may be dead and gone). So stands the case with regard to the wife. By the old as well as by the new law, she has the settlement of her husband.

Then with regard to the children, the case before the statute stood thus: They are legitimate children and under the age of sixteen and unemancipated, and consequently before the statute they would have derived their settlement from the father or mother, or would have been settled where they were born, but the foundation of this is that birth is only a primâ facie settlement, it does not become a conclusive settlement, except in those cases where the derivative settlement is not known. I have said that these are legitimate children, and we have upon the present occasion, of course, nothing to do with bastard children, except by way of illustration. But in that view it is important to look at the legislation with reference to bastard children, for the purpose of ascertaining the policy of the legislature in the enactment now before us.

Originally bastard children were in a different position from legitimate children, they were the children of nobody, and could derive nothing from anybody; they could not derive a settlement, and consequently of necessity were always removed to the place of their birth, with one exception, which shews the anxiety on the part of the legislature not to separate persons who cannot take care of themselves. This exception was in the case of nurslings who, up to a certain tender age, could not be separated from

the mother. But the law as to bastards was altered by 4 & 5 Wm. 4, c. 76, s. 71, which made a bastard child follow the settlement of the mother until the age of sixteen or until it had acquired a settlement in its own right. I have adverted to that for the sake of pointing out by way of illustration the policy of the legislature in regard to the removal to one and the same place of the mother and the child. As to legitimate children they were first benefited by the Act we have to deal with. Before the passing of that Act the three children now in question, would have taken the last settlement of their father, and it may be that that would have had the effect of separating them from their mother, but the statute in question not only excepts the mother from the abolition of derivative settlement, but also excepts the children, for s. 35 says: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen." Therefore a child under sixteen is excepted and may still derive a settlement by parentage. What is the settlement which it is to derive from parentage? It is to be the settlement of its father or widowed mother, as the case may be, up to the age of sixteen. Then the section goes on: "Which child may take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." Therefore, again, the legislature fixes the child's settlement at that of the parent up to a particular age, and it prevents what was previously possible, viz., the removal of the child to any subsequent settlement acquired by the father. It therefore fixes the child's settlement at that place where it was most likely the child would be conversant, that is to say, the most recent place of the father's settlement. "So far as possible," the legislature seems to say, "let the child go to its parent and with its parent." But if the section had stopped there, the child, being excepted from the abolition of derivative settlement, and still deriving its settlement, by the very Act, from its parent, it might turn out that the parent's settlement was a derivative settlement gained at a period prior to the abolition of derivative

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Field, J.

settlement, but which might still, therefore, be the settlement of the child. The effect would have been that the child might still have to be sent a long way from where it was conversant; that, it appears to me, the legislature intended to prevent, and it proceeds to legislate in regard to it, and says: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Therefore, it being the intention to abolish derivative settlement as far as possible, it would seem that the legislature thought in that particular event it would be better for a child to be sent to its place of birth, rather than to a place to be ascertained by an inquiry into a derivative settlement which might have been gained by a distant ancestor many years before. Whether that is a wise policy, whether it was exactly right, and whether it has secured in all cases the very object the legislature intended, I am not prepared to say, but I may say generally that it seems to me to have been wise and prudent, though no doubt it is open to the observations made by Mr. Bosanquet to the effect that some cases may arise where it will work the very mischief which the general policy of the Act, according to my idea, intended to prevent. I have carefully examined all the recent authorities upon the construction of the section of the statute, but I do not go through them now because I have read my Brother Cave's comments upon them, in which I concur. I am glad to find that my Brother Cave concurs in the views I have expressed, but although we have arrived at the same conclusion our grounds are quite independent of each other. I continue to entertain the view I have before expressed, and, therefore, I hold that the order of the Quarter Sessions is right, and must be affirmed.

CAVE, J. The question in this case is what construction is to be placed on 39 & 40 Vict. c. 61, s. 35, a question not free

from difficulty, owing partly to the language of the section and partly to the interpretation which appears to have been placed upon it by judicial decisions.

The section first enacts that "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise." Now stopping there for a moment, it may be observed that there are only two species of derivative settlement, viz., settlement by marriage and settlement by parentage. By the former, if a woman married a man who had a known settlement she acquired the husband's settlement, and she took every subsequent settlement which he might obtain until his death. If the husband had no settlement, then the prior settlement of the wife continued. By the latter, legitimate children took the settlement of their father; and they took successively any settlement which the father might from time to time acquire before their emancipation. If the father had not a settlement acquired by his own act, they took the settlement he derived from his parents till it could be traced no further, and recourse was then had to the maiden settlement of the mother. If neither father nor mother had a known settlement, acquired or derivative, the children were settled in the place of their birth until they acquired another settlement by their own act.

The case of an illegitimate child differed. Previous to the Poor Law Amendment Act, 1834, the settlement arising from the place of birth of a bastard was in general only superseded by a settlement subsequently acquired by the bastard in his own behalf; but by s. 71 of that Act it was enacted that "every child born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." In *Reg.* v. *St. Mary's, Newington* (1), it was held that, by virtue of this section, illegitimate children (differing in this respect from legitimate children) followed the mother's settlement acquired by marriage after their birth, and while they were under sixteen years of age; and in *Bodenham* v. *St. Andrew's* (2) it was held that illegitimate children followed the

(1) Law Rep. 4 Q. B. 581. (2) 1 El. & Bl. 465.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Cave, J.

mother's settlement only until they were sixteen, and that a bastard, who had attained that age without having acquired any settlement of its own, was settled in the place of its birth, though the mother was settled elsewhere.

Applying so much of 39 & 40 Vict. c. 61, s. 35, as has been already cited to the previous law, a wife could no longer have taken the settlement of her husband, nor a legitimate child that of its parents, nor a bastard that of its mother. The section, however, proceeds to make the following exceptions from the generality of this first part, "except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." The exception in the case of a wife has been held entirely to exclude derivative settlement by marriage out of the operation of the first part of the section, so that a wife will take the settlement which the husband has at the time of the marriage, whether acquired or derivative, and every subsequent settlement which he may obtain until his death: *Great Yarmouth* v. *City of London*. (1) The subsequent exception seems to exclude derivative settlement by parentage out of the operation of the first part of the section, to this extent, that a child will take the settlement of its father so long as he lives, and the subsequently acquired settlement of its widowed mother, only up to the age of sixteen, and not up to emancipation as before.

The latter part of this exception seems intended to preclude the interpretation which was put on s. 71 of the Poor Law Amendment Act, 1834, in *Bodenham* v. *St. Andrew's* (2), since it goes on to provide that the child shall retain the settlement so taken (that is, the settlement of its father or widowed mother which it actually has at the age of sixteen) until it shall acquire another.

The next part of the section, "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement" seems obviously intended to abrogate the rule laid down as to illegitimate children in *Bodenham* v. *St. Andrew's*. (2)

(1) 3 Q. B. D. 232. (2) 1 El. & Bl. 465.

Had the section stopped there a doubt might have arisen whether the settlement of its father or of its widowed mother which the legitimate child was to take and retain, or the settlement of its mother which the bastard was to retain, included not only their birth settlements or settlements acquired in their own right, but also in the case of the father a settlement derived by parentage, or, in the case of the mother, a settlement derived by parentage or marriage. The section accordingly goes on to provide as follows: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born," or, in other words, a legitimate child will up to the age of sixteen take the last settlement which the widowed mother may have acquired in her own right after the death of its father, or failing that, it will take the last settlement which the father shall have acquired in his own right, or in the absence of any such settlement it will take the father's birth settlement, and it will retain the settlement which it had at the age of sixteen until it has acquired another in its own right, but it will in no case take any derivative settlement acquired by the widowed mother by a second marriage: *Keynsham Union* v. *Bedminster Union* (1), or any derivative settlement acquired by either parent by parentage; while an illegitimate child up to the age of sixteen will take the last settlement which the mother may have acquired in her own right, and in the absence of any such settlement it will take her birth settlement, and will retain the settlement which it had at the age of sixteen until it has acquired another in its own right, but will in no case take any derivative settlement acquired by the mother by parentage or (abrogating *Reg.* v. *St. Mary's, Newington* (2)) by marriage.

This being, as it seems to me, the natural construction to put on the section in question, I am next led to inquire whether any other construction has been put upon the section by any previous case. The first case to which we were referred is that of *West-*

(1) 3 Q. B. D. 344. (2) Law Rep. 4 Q. B. 581.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Cave, J.

bury-on-Severn v. *Barrow-in-Furness*. (1) In that case the pauper, who was more than sixteen at the time of the passing of 39 & 40 Vict. c. 61, had acquired no settlement of his own, but before he had attained the age of sixteen his father had acquired a settlement in his own right by estate. The appellants contended that the first two lines of the 35th section were retrospective, so as to take away the derivative settlement the pauper would otherwise have gained, but that the exception in the same clause of the Act was not retrospective, and, consequently, that the pauper had lost the old derivative settlement, and had not acquired the new modified one. It is not surprising that this contention was unsuccessful, but the decision (with which I entirely agree) in no respect conflicts with the view which I have taken above of the construction of the section. Indeed the observation at page 94 of the judgment directly supports that view. It is there said, "If in order to prove the place of settlement of the pauper as derived from the father it had been necessary to prove the derivative settlement of the father, then by the direct enactment of the 3rd paragraph of the 35th section the pauper would be deemed to be settled in the parish where he was born."

The next case which was cited to us was *Great Yarmouth* v. *City of London* (2) in which it was held that the wife of a man who had, while under the age of sixteen, derived a settlement from his father, took this derivative settlement of her husband and not his birth settlement. There is no doubt that in that case the husband, being within the clear language of the Act, took a derivative settlement from his father, and all that that case decides is, that under those circumstances the wife takes the derivative settlement of her husband under the exception in the first paragraph of the section "except in the case of a wife from her husband." For myself, I should not like to express an opinion on this point without further consideration, but at any rate this case is no authority for holding that, notwithstanding the third paragraph, the children of the husband would have taken the settlement which their father derived from his parent.

The next case in point of time is *Woodstock Union* v. *St. Pan-*

(1) 3 Ex. D. 88. (2) 3 Q. B. D. 232.

cras (1) in which it was held that a female pauper, whose father had never acquired a settlement of his own, did not take the derivative settlement which the father while under sixteen had acquired from his father, but was settled in the place of her birth by virtue of the third paragraph of the section. This decision again is entirely in conformity with the construction I place on the section in question, and I heartily subscribe to the judgment delivered in that case, especially to that of my Brother Field.

The next case is *Manchester* v. *St. Pancras* (2) in which it was held that an illegitimate child under sixteen is, by the third paragraph of the section, precluded from taking the settlement of its mother where such settlement has been derived from her marriage. In that case the pauper who was nine years of age was born three years after his mother, who had since died, had been divorced from her husband, and Lush, J., says that the words in the third paragraph, "any child in this section mentioned," mean any legitimate or illegitimate child, and that there is nothing to confine the expression "any child" to any particular class of children.

The next case is *Guardians of Hollingbourn* v. *Guardians of West Ham* (3), and as that case was much pressed upon us, and has caused me to hesitate greatly, it is necessary to examine it somewhat closely. By an order of removal affirmed at quarter sessions, it was adjudged that the last legal settlement of Sarah Thorndycraft, and her four children, who were all under the age of sixteen, was in the parish of Sutton Valence. John Thorndycraft the younger, the husband of Sarah, was born in Hackney, but acquired no settlement in his own right. John Thorndycraft, sen., the father of the husband, was born in Sutton Valence in 1804, but lived and was married in the parish of Hackney, and never acquired any settlement in his own right. It was admitted that Sarah Thorndycraft was legally settled in the parish of Sutton Valence, I presume on the ground that she took the derivative settlement of her husband and not his birth settlement, and in deference to the authority of *Great Yarmouth* v. *City of London*. (4)

(1) 4 Q. B. D. 1.
(2) 4 Q. B. D. 409.
(3) 6 Q. B. D. 580.
(4) 3 Q. B. D. 232.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Cave, J.

The question for the Court was what settlement the children took, and it was held that they took the settlement of the mother, although that settlement could only be arrived at by inquiring into her derivative settlement. Looking at the judgment, the Court there seems to have held that the first paragraph referred only to children who had a father or widowed mother alive; the second to illegitimate children of any age; and the third to legitimate children who had not a father or mother alive and to illegitimate children of any age. I find myself unable to assent to this division. By the first paragraph, as I read it, children on their birth take their father's settlement as they would have done before the Act, except that they take no settlement he may acquire after they have attained the age of sixteen years. If that is so, they take on their birth the settlement their father then has, and they continue to follow each successive settlement acquired by him in his own right (*Cumner* v. *Milton* (1)) until they attain sixteen, when they no longer take any future settlement he may acquire, but retain that they had at sixteen until they acquire another in their own right. If the father dies before they are sixteen, they retain the settlement they had at his death, unless the widowed mother subsequently acquires one in her own right, in which case they take each successive settlement she may so acquire in her own right up to the time of their attaining the age of sixteen, and then they retain the settlement last acquired from her until they acquire another in their own right. The assumption that they only retain the father or widowed mother's settlement so long as he or she is living is, it seems to me, inconsistent with the provision at the end of the first paragraph, that the child shall take the settlement of the father, &c., up to sixteen, and shall retain the settlement so taken until it shall acquire another. To my mind, the words "in the case of a child under the age of sixteen" include all legitimate children, whether the parents are alive or dead.

I am also unable to assent to the proposition that the second paragraph includes illegitimate children of any age. As I have shewn above, under the Act of 1834, illegitimate children took the settlement of their mother only up to the age of sixteen,

(1) 2 Salk. 528.

and on arriving at that age lost her settlement and took their birth settlement only. The second paragraph of the section in question does not say that illegitimate children shall take any settlement acquired by their mother after they have attained the age of sixteen, but only that they shall retain the settlement of the mother, which by the previous law they retained only up to that age, until they have acquired another settlement. This construction puts an illegitimate child on the same footing, with reference to a settlement derived from its mother, as a legitimate child is with reference to a settlement derived from its father, or after his death, from its widowed mother, except that, had the section stopped there, an illegitimate child would have taken the settlement acquired by its mother by marriage subsequently to its birth, while a legitimate child would not have done so: *Keynsham Union* v. *Bedminster Union.* (1)

I am also unable to accede to the view that the third paragraph applies to legitimate children under sixteen, not having a father or mother alive, and also to illegitimate children whether under or over sixteen. The words are "any child in this section mentioned," which, to my thinking, must include both the legitimate children mentioned in the first paragraph, and the illegitimate children mentioned in the second, and cannot refer to any children not included in one or other of those paragraphs. If I am right, the effect of the third paragraph is to cut down both the first and second, so as to prevent children, whether legitimate or illegitimate, taking any derivative settlement of their parents, and also again to put legitimate and illegitimate children on the same footing, by preventing the latter from taking the settlement of the mother acquired by subsequent marriage, while if *Guardians of Hollingbourn* v. *Guardians of West Ham* (2) is right, a distinction is introduced between legitimate children under sixteen who have a parent alive, and those who have not, and also between legitimate children under sixteen and illegitimate children of the same age in respect of the settlement they take from their respective mothers.

Although, however, I am unable to agree with the decision of the Court in that case, I should probably have felt myself bound

(1) 3 Q. B. D. 344. (2) 6 Q. B. D. 580.

1882

THE QUEEN v. GUARDIANS OF BRIDGNORTH.

Cave, J.

by it, had it not been, as it seems to me, inconsistent with the principles laid down in *Manchester* v. *St. Pancras.* (1) Both cases were before the Court which decided the still later case of *Reg.* v. *Guardians of Portsea* (2), and although the two cases cited were alleged in the argument to be inconsistent, the Court there followed the case of *Manchester* v. *St. Pancras* (1), without attempting to distinguish it from the later case. I think, therefore, I am free in this conflict of authority to follow that which approves itself to my judgment.

Applying the principles, to which I have referred, to the present case, I am of opinion that the children in this case came within the first paragraph, and would have taken the settlement of their father William, or, failing that, the settlement of their mother, had they not also fallen within the third paragraph, which precludes their taking the settlement of either, because neither father nor mother had any but a derivative settlement.

As to the arguments drawn from the supposed policy of the law against separating the children from their parents, I am, I confess, unable to discover what that policy is. It is true that if a father has none but a derivative settlement, on my interpretation of the section, he will be separated from his children, if all become chargeable together, but that, as it seems to me, will also be the case if the widowed mother marries again. Looking, however, at the facility given for acquiring a settlement by s. 34 of the Act of 1876, it seem probable that questions as to derivative settlement will not be very frequent in future.

Rule discharged.

Solicitors for appellants: *C. R. & H. Cuff, for G. Bard, Trowbridge.*

Solicitors for respondents: *Cole, Turner, & Knight, for Cooper & Haselwood, Bridgenorth.*

(1) 4 Q. B. D. 409. (2) 7 Q. B. D. 384.

J. R.

[IN THE COURT OF APPEAL.]

1882
July 3.

BECKETT & CO. *v.* ADDYMAN.

Principal and Surety—Joint and Several continuing Guarantee—Discharge of Surety—Death of Co-Surety—Liability of surviving Co-surety.

The death of one of the co-sureties under a joint and several continuing guarantee does not by itself determine the future liability of the surviving co-surety.

Claim, that by a bond G. and H., as principals, and the defendant and W., since deceased, as sureties, became jointly and severally bound to the plaintiffs, subject to a condition that if the obligors should repay to the obligees all sums of money to be by them advanced to G. and H., so that the defendant and W. should not be responsible for more than 250*l.*, the bond should become void: that W. died before action: that after his death the plaintiffs made advances to G. and H.: that G. and H. liquidated their affairs by arrangement pursuant to the Bankruptcy Act, 1869: that more than 250*l.* was owing from them to the plaintiffs.

Defence, that shortly after the decease of W. the plaintiffs had notice of the existence of his will, and that executors thereunder had proved it:—

Held, upon demurrer, that the defence was bad.

CLAIM. 1. The plaintiffs are bankers and co-partners, trading at Leeds and other places in the county of York.

2. By a bond dated the 22nd day of July, 1867, and duly executed by the parties intended to be thereby bound, J. W. Grayson and W. H. Hardisty, as principals, and the defendant and J. Wright, since deceased, as sureties, became and were bound in the penal sum of 500*l.* jointly, and each of them severally for the whole, their heirs, executors, and administrators, and the heirs, executors, and administrators of each and every of them, to the then partners in the plaintiffs' firm as bankers.

3. The bond contained a recital that the bankers at the instance and request of J. W. Grayson and W. H. Hardisty, and upon their agreeing to enter into the above-mentioned obligation, and also upon the defendant and Wright proposing and agreeing to become and remain security and continuing guarantee by the bond for an eventual balance to the extent of 250*l.* in manner thereinafter expressed, had agreed to open a running and fluctuating banking account with, and from time to time to advance to, J. W. Grayson and W. H. Hardisty, to such amount as the

1882

BECKETT v. ADDYMAN.

bankers should see convenient, and that the said security and guarantee thereby given was intended not to be discharged, notwithstanding J. W. Grayson and W. H. Hardisty should not at any time or times thereafter stand indebted to the bankers upon a general balance of account, but was to continue of the same force and effect for securing the payment of any future balance to arise as thereinafter mentioned, as the same would have been if J. W. Grayson and W. H. Hardisty had remained constantly indebted to or in account with the bankers; and the condition of the bond was such that if the obligors, some or one of them, their some or one of their heirs, executors, or administrators, did and should at all times thereafter well and truly as the same should respectively become due and payable or ought to be paid, or on demand, or any notice for that purpose as the case might require, pay, or cause to be paid, unto the bankers all and every such sum and sums of money as they the bankers had already advanced, paid, or lent, or should thereafter from time to time advance, pay, or lend, or had already or should thereafter from time to time become responsible or liable to pay in anywise howsoever, to or for the use or by the orders or directions, or for the credit or on account of J. W. Grayson and W. H. Hardisty, or which should or might at any time or times thereafter, in any manner or upon any account whatsoever, become or be found eventually due or owing from J. W. Grayson and W. H. Hardisty, to the said bankers, for or by reason or means of any dealings, transactions, or negotiations, whatsoever between them, either upon the first original advancement of any moneys, or upon the final balance of account between the parties or otherwise howsoever, as in the condition expressed, together with interest for the advances, and the legal commission, bankers' charges, and other expenses thereon, ("Yet so nevertheless that the said Robert Addyman and Joseph Wright, their respective heirs, executors, or administrators, should not be responsible for or chargeable with, nor should these presents be held or considered as a security for more than the principal sum of 250*l.* in the whole"), then, and upon due and full performance of the aforesaid condition in every respect, the said obligation should be void; otherwise the same should remain and be in full force and virtue.

4. The bond or obligation was expressed to enure for the benefit of the partners for the time being of the firm of Beckett & Co.

5. The firm of Beckett & Co. accordingly opened an account with J. W. Grayson and W. H. Hardisty at their bank, and honoured their cheques, and otherwise advanced and paid money to and for them on their said account and otherwise, and at the death of J. Wright hereinafter mentioned, a balance or sum exceeding 250*l.* was due from J. W. Grayson and W. H. Hardisty to the firm of Beckett & Co., upon their account and otherwise.

6. J. Wright died on or about the 22nd day of March, 1872, and the firm of Beckett & Co. had notice of his death.

7. Since the death of J. Wright and notice to the firm of Beckett & Co. thereof, J. W. Grayson and W. H. Hardisty have paid into their current account with the firm sufficient sums of money to cover the balance due to the firm upon the account or otherwise at the date of the death of J. Wright, and of notice to the firm thereof respectively.

8. After the death of J. Wright and of the notice to the firm thereof, and before the liquidation proceedings instituted by J. W. Grayson and W. H. Hardisty next hereinafter mentioned, the firm of Beckett & Co. honoured the cheques and otherwise advanced and paid money to and for J. W. Grayson and W. H. Hardisty on their account and otherwise, and at the date of their liquidation proceedings, a balance or sum exceeding 250*l.* was due from J. W. Grayson and W. H. Hardisty to the plaintiffs upon their account and otherwise.

9. J. W. Grayson and W. H. Hardisty filed a petition for the liquidation of their affairs by arrangement or composition, on or about the 16th of March, 1881, and resolutions for liquidation by arrangement have been duly passed, and a trustee appointed pursuant to the Bankruptcy Act, 1869.

10. All conditions have been fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiffs to recover the balance or sum exceeding 250*l.* from J. W. Grayson and W. H. Hardisty, yet the same remains due and unpaid.

11. The plaintiffs have applied to the defendant for payment under the before-mentioned bond or guarantee, of the sum of 250*l.*,

1882

BECKETT v. ADDYMAN.

part of the balance or sum due to the plaintiffs as aforesaid, but the defendant has refused, and still refuses, to pay the same or any part thereof.

Defence. 1. The defendant admits the paragraphs 1 to 9 inclusive of the claim.

2. The death of J. Wright was known to the defendant at or about the same time that the plaintiffs had notice thereof.

3. Shortly after the death of J. Wright the plaintiffs and the defendant had notice of the existence of his will, and that the executors thereunder had proved the same, and the executors opened an account on behalf of the estate in their name as executors of the said will, in the plaintiffs' bank.

4. Since the plaintiffs had notice of the matter in the preceding paragraph set forth, and since the opening by the executors of the account therein mentioned, J. W. Grayson and W. H. Hardisty paid into their account with the firm sufficient sums of money to cover the balance due to the firm upon their account or otherwise at such dates respectively.

5. The defendant does not admit the allegations of the performance of conditions precedent or any of the allegations in paragraph 10, otherwise than so far as they are expressly admitted in this defence or stated specifically in the claim.

6. The defendant admits the allegations in paragraph 11 of the claim.

Demurrer to the defence.

Sir Farrer Herschell, S.G. (*Barber*, with him), for the plaintiffs. The action is on a joint and several guarantee of a banking account. The death of one of the two guarantors did not end the guarantee as regards the other; and *Coulthart* v. *Clementson* (1) relied on by the defendant is not a decision to that effect. On the death of Wright, the liability of his estate under the guarantee no doubt terminated, and the defendant might have given notice and ended his suretyship, but he did not, and the guarantee being several as well as joint he is liable.

W. G. Harrison, Q.C. (*Moulton*, with him), for the defendant. A continuing guarantee is revocable at will, and death terminates

(1) 5 Q. B. D. 42.

it. Each advance by the bankers is a new transaction: see *Offord* v. *Davies*. (1) They are of course not bound to make advances to the principal, but the guarantors agree to be responsible if advances are made, so that if either guarantor pays he may recover over against the other.

[FIELD, J. A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor: *Ex parte Snowdon, In re Snowdon*. (2)]

The defendant agreed to a joint and several suretyship, and to treat him as if liable on a several suretyship only is an attempt to bind him by a different contract.

[FIELD, J. What force then is there in the word "several?" Could he not be sued alone on the joint guarantee?]

Subject, before the Judicature Acts, to a plea in abatement. The defendant agrees to be liable as co-surety only, although he may be willing to be sued alone. The death of his co-guarantor ends the guarantee as regards further advances. Where two are jointly and severally bound in a bond, a release to one discharges the other, and in such a case if the joint remedy is gone the several is gone to: *Clayton* v. *Kynaston*. (3)

[He cited also *Cheetham* v. *Ward* (4); *Nicholson* v. *Revill* (5); *Evans* v. *Brembridge*. (6)]

W. Barber, in reply. The proposition of the defendant is new. The equitable doctrine of contribution does not depend on contract. Contribution is a matter between the sureties, and never enters into the contract between the guarantors and the guaranteed. The death of one guarantor does not affect the question: *Steel* v. *Dixon* (7); *Hitchman* v. *Stewart*. (8) The present case would not have been raised but for *Coulthart* v. *Clementson* (9), which, although it may be doubted, is an authority in this Division to show that the estate of the deceased guarantor is not liable for advances made since his death to the principal. But so far as it applies, it is a decision in favour of the plaintiffs, for the

(1) 12 C. B. (N.S.) 748.
(2) 17 Ch. D. 44.
(3) 2 Salk, 574.
(4) 1 B. & P. 630.
(5) 4 Ad. & El. 675.
(6) 2 Kay. & J. 174.
(7) 17 Ch. D. 825.
(8) 3 Drew. 271.
(9) 5 Q. B. D. 42.

1882

BECKETT v. ADDYMAN.

defendant, the survivor of two guarantors, was not sued as co-guarantor, but only as executor of the deceased guarantor.

Cur. adv. vult.

Feb. 4, 1882. FIELD, J. This case was argued before me on demurrer to the statement of defence.

The plaintiffs sued to recover a sum of 250*l.*, the limit of a joint and several continuing guarantee by the defendant and another surety, named Wright, for advances by the plaintiffs as bankers to Grayson and Hardisty, who had an account with them.

Wright, the defendant's co-surety, died on the 22nd of March, 1872, and both the plaintiffs and defendant had notice of the death at the same time.

The plaintiffs continued the account after Wright's death, and made further advances to Grayson and Hardisty, and there being a larger balance due on the account to the plaintiffs than the limit of 250*l.*, it was to recover the latter sum that the action was brought.

The statement of defence alleged circumstances connected with Wright's testamentary dispositions calculated to bring the case within the authority of the recent decision of *Coulthart* v. *Clementson* (1), and to this statement of defence the plaintiffs demurred.

Mr. Barber, who argued the case for the plaintiffs, admitted that the case of *Coulthart* v. *Clementson* (1) was a binding authority in this Division for the proposition that the guarantee had, under the circumstances set up in the statement of defence, been determined as to Wright's estate; but he denied that either upon principle or authority the death of Wright had determined the defendant's liability.

Upon the part of the defendant it was contended that it had that effect, and the argument was based upon the well-established doctrine, that if a surety enters into a contract of suretyship contemplating that another surety shall join, and on the terms that the contract shall be executed by his co-surety, and the creditor omit to have that done, the executing guarantor is not liable upon his guarantee, and this result follows although the

(1) 5 Q. B. D. 42.

contract of suretyship is (as in the present case) several as well as joint, equity not regarding for this purpose the form of the contract.

This rule is founded on the sensible principle that a surety is entitled to have the original contract intended by him and all parties carried out, and if by the neglect of the creditor the terms upon the faith of which the surety entered into the contract are materially departed from by omitting to make the intended co-surety a party to the contract, the one who executes is not bound.

The effect of the creditor's omission is to throw the payment of the whole sum guaranteed upon the surety who has executed the contract, and paid the amount without his being able to recover contribution from the intended co-surety: *Bonser* v. *Cox* (1); *Evans* v. *Brembridge* (2), contrary to the right of contribution which the executing surety otherwise would and ought to have had.

But in those cases it appears that a material term upon the faith of which the surety came under his contract has been negligently departed from by the creditor, by whose omission to procure the execution by the co-surety the position of the executing surety is materially altered for the worse.

The omission also is directly contrary to the intention of the parties.

But in the present case the death of one of the co-sureties was a possible event which must have been in contemplation of all the parties at the time of the execution of the guarantee.

It is in no sense the act of the creditor; it does not happen from anything done or omitted to be done by him, nor is it an event in any way under his control any more than bankruptcy, which has no such effect as is contended for: *Ellis* v. *Wilmot.* (3)

Moreover it is an event over the consequences of which the surety has a control, for as soon as the defendant had notice of Wright's death it was competent to him at once to have revoked his guarantee and thus determined his further liability: *Offord* v. *Davies and Another.* (4)

(1) 4 Beav. 379.
(2) 2 K. & J. 174.
(3) Law Rep. 10 Ex. 10, 13.
(4) 12 C. B. (N.S.) 748.

1882

BECKETT v. ADDYMAN.

But as knowing that the plaintiffs might and in the ordinary course of business would continue the account with Grayson and Hardisty, he has omitted to take the means in his power of determining his further liability, he must, I think, be taken by thus standing by to have induced the plaintiffs to act in making further advances in the belief that he was willing that his several further liability should continue: *Leaf* v. *Gibbs* (1); and per Tindal, C.J., in *Browne* v. *Carr.* (2)

I think, therefore, that the statement of defence is bad, and that the demurrer must be allowed and judgment be given for the plaintiffs with costs.

Judgment for the plaintiffs.

J. R.

The defendant appealed.

July 3, 1882. *Petheram, Q.C.*, and *Ashton*, for the defendant. The question is whether the death of the co-surety has put an end to the liability of the defendant. Field, J., held that the defendant was bound, although his co-obligor, Wright, was dead: *Coulthard* v. *Clementson* (3) establishes that the estate of Wright was discharged by his death; and this shews that in equity the defendant likewise is discharged from his undertaking. The defendant would have an equity against the estate of his co-obligor, and it would be hard that he should be deprived of it and yet should be held liable to the plaintiffs; for the plaintiffs, after notice of the death of Wright, the co-surety, would have no remedy against his estate. *Lloyd's* v. *Harper* (4) is not against the defendant; the judgment proceeded upon the principle that a guarantee, the consideration for which is given once for all, cannot be determined by the guarantor, and does not cease on his death.

W. Barber, Q.C., and *Faber*, for the plaintiffs. It may be doubtful whether *Coulthard* v. *Clementson* (5) is good in point of law, but it does not extend to this case. The defendant is liable at law upon a joint and several bond, and he has no equity against the plaintiffs; for they have done no act to discharge him. The

(1) 4 C. & P. 466.
(2) 7 Bing. 508, at p. 516.
(3) 5 Q. B. D. 42.
(4) 16 Ch. D. 290.
(5) 5 Q. B. D. 48.

doctrine of contribution amongst sureties is the result of general equity on the ground of equality of burden and benefit: *Dering* v. *Earl of Winchelsea* (1); but it cannot defeat the rights of an innocent creditor against one of the sureties.

Petheram, Q.C., did not reply.

LORD COLERIDGE, C.J. The defendant is clearly liable upon the terms of the instrument, at least by the principles of the Common Law, but it is contended that there is some principle whereby the persons guaranteed who have done nothing are not entitled to sue upon the bond of which the defendant was obligor; for the other person who as a surety became obligor is now dead. It is said that some ground for relief exists in equity, and cases in equity may be cited in which it has been decided that relief ought to be granted, because the creditors had done some act behind the back of the surety. But no ground like that exists in the present case. I think it must be taken that by the terms of the bond the death of one of the sureties was to some extent contemplated, and that it was not intended to discharge the other. It is probable that the defendant could have terminated his liability by notice; for it seems to be clear that in the case of a continuing guarantee for goods to be supplied or money to be advanced, it is in the power of the guarantor to determine his liability; but if the surety takes no steps he remains liable. In the present case it is plain that the creditors can recover on the bond. The judgment of the Court below must be affirmed.

BRETT, L.J. This bond must be construed as a joint and several obligation. At Common Law it must be deemed to consist of separate deeds, and the defendant is primâ facie separately liable. What are the defendant's rights at law against the plaintiffs, and what are the plaintiffs' rights against him? The defendant might have given notice to determine his liability; but no notice has ever been given. At law the defendant is clearly liable until he has given notice. Then, has the defendant any relief in equity? The cases cited during the argument do not shew that

(1) 1 Cox. (Ch. Ca.) 318.

1882

BECKETT v. ADDYMAN.

any equity exists in his favour. It has been contended that the defendant would have an equity against his co-obligor. That may be true, but it does not follow that the liability to the obligees of the bond would likewise determine. It has been argued that the liability of the estate of the co-obligor has determined, and therefore that the liability of the defendant is at an end. I will not now decide whether the estate of the co-obligor is liable; but assuredly the determination of that liability can in no case discharge the defendant. To hold that the defendant is discharged under the circumstances disclosed in the pleadings would be tantamount to striking out the obligation contained in the bond. I can see no equity against the plaintiffs. As they have done nothing, no equity exists against them, and they may recover upon their legal right.

COTTON, L.J. At law the defendant is clearly liable. But it is contended that, as the plaintiffs had notice of the co-obligor's will and of the appointment of the executors, the defendant is discharged. It is doubtful whether mere notice of the death and of the will could put an end to the liability of the estate; but I will assume that it did. How can that circumstance alter the position of the co-surety? If the creditor deprives the surety of his rights, that may put an end to his liability; but here the plaintiffs have done no act to discharge the defendant; in my opinion the defendant has no equity against the plaintiffs. The decision in the Queen's Bench Division was right.

Judgment affirmed.

Solicitors for plaintiffs: *Paterson, Snow, & Bloxam, for Dibb, Atkinson, & Braithwaite, Leeds.*

Solicitors for defendant: *Emmet, Son, & Stubbs, for J. W Addyman, Leeds.*

J. E. H.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January, 1882, will be as follows:—

In the First Series,
19 Ch. D.

In the Second Series,
8 Q. B. D. 7 P. D.

In the Third Series,
7 App. Cas.

INDEX.

ACCORD AND SATISFACTION — *Delivery of Cheque.*] A., being indebted to B. in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B. a cheque for 100*l.* payable on demand, which B. accepted in satisfaction:—*Held*, a good accord and satisfaction.—*Cumber* v. *Wane* (Stra. 426) and *Sibree* v. *Tripp* (15 M. & W. 23) observed upon. GODDARD *v.* O'BRIEN - - - - 37

ADULTERATION—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 13, 14, 20, 21—*Private Purchaser—Public Officer—Penalty, Proceedings to recover—Notification to Seller of intention to have Article analysed—Condition precedent.*] The provisions of s. 14 of the Sale of Food and Drugs Act, 1875, apply to the purchase of an article by a private person as well as by one of the public officers named in the Act; so that it is a condition precedent to the right of a private purchaser to take proceedings for a penalty under the Act that he should have given to the seller the notification required by that section. PARSONS *v.* BIRMINGHAM DAIRY COMPANY 172

AFTER-ACQUIRED PROPERTY — Covenant to settle - - - - 337
See HUSBAND AND WIFE.

ALTERATION—Bank note—Erasure of number
See BANK OF ENGLAND. [555

AMENDMENT—Record—Court of Appeal 276
See PRACTICE.

APPEAL—Case stated by arbitrator—Interlocutory or final order - - - 621
See PRACTICE. 3.

APPRENTICE—*Master and Servant—Unlawful Command—Change of Locality of Business—Outdoor Apprentice—Division of Business.*] The plaintiff was bound apprentice to the defendants and their partners and successors in business in the trade of an engineer; and his father covenanted to provide him with board, lodging, and other necessaries. At the date of the indenture the business was carried on by the former defendants in London, where also the father of the apprentice resided, but there was no stipulation in the indenture as to the place where the business should be carried on. Before the term of the apprenticeship expired the defendants' partnership was dissolved and the two firms established, one in London consisting of two of the defendants, and the other at Derby consisting of the other two; the manufacturing part of the old business being carried on at Derby and the selling part in London. The defendants called on the plaintiff to attend at the place of business at Derby:—*Held*, that there was an implied stipulation that the contract was to be performed at the place where the business was carried on and the parties resided at the date of the indenture; and that the direction to the apprentice to go to Derby was an unreasonable command which he was not bound to obey.—*Held*, also, that as the business was not carried on in its entirety by either of the two new firms, neither of them was the successor of the original firm or entitled to the services of the apprentice.—*Royce* v. *Charlton* (8 Q. B. D. 1) overruled. EATON *v.* WESTERN [C. A. 636

ARBITRATION—*Submission—"Costs of Reference"—Award—Costs of Award.*] Power, in a submission to arbitration, over the "cost of the reference," includes power to award the costs of the award. IN RE AN ARBITRATION BETWEEN WALKER & SON, AND BROWN - - 434

2. —— *West Kent Main Sewerage Act*, 38 & 39 *Vict. c. clxiii.—Construction of s.* 93—*Submission—Jurisdiction of High Court.*] The West Kent Sewerage Board is incorporated by a local Act of 38 & 39 Vict. c. clxiii., and by s. 93 it is enacted that, if any difference arises between the board on the one hand and any constituted authority or person on the other hand, or between any two or more constituted authorities, or between any constituted authority and any parish or person, respecting any assessment of a main sewer rate, or any determination of the board, or any controversy or other matter under the Act, the same shall by virtue of the Act stand referred for decision to the Local Government Board, whose decision thereon and respecting the costs of the reference shall be final and binding.—A dispute having arisen between the West Kent Sewerage Board and the Bexley Local Board respecting a claim made by the local board against the sewerage board for compensation for damage done to the highways, &c., of the district, the disputants, with the consent of the Local Government Board,

ARBITRATION—*continued.*
stated a case for the opinion of this Court:—*Held*, that it was not competent to them to do so, the Local Government Board being by s. 93 constituted the tribunal whose decision on the matter was to be final and binding, and this not being a submission to arbitration within s. 5 of the Common Law Procedure Act, 1854. Bexley Local Board *v.* West Kent Sewerage Board [518

ARBITRATION, REFERENCE TO—Stay of proceedings - - - - 188
See Practice. 13.

ASSEMBLY, UNLAWFUL—Meeting for lawful purpose - - - - 308
See Criminal Law. 3.

ATTACHMENT OF DEBTS—*Garnishee Order—Wages Attachment Abolition Act*, 1870 (33 & 34 *Vict. c.* 30), *s.* 1—*Salary of Secretary attachable.*] The salary of a secretary to a company amounting to 200*l.* a year is not "wages" of a "servant" within the Wages Attachment Abolition Act (33 & 34 Vict. c. 30) and is therefore not exempted from attachment by that Act. Gordon *v.* Jennings - - - - - - - 45

ATTACHMENT—Notice of motion - - 335
See Practice. 2.

ATTESTATION—Bill of sale—Affidavit for verifying attestation - - - 139
See Bill of Sale. 2.

—— Bill of sale—Solicitor of grantee - 137
See Bill of Sale. 1.

BANK OF ENGLAND—*Action on Note—Erasure of Number—Material Alteration.*] In an action against the Bank of England for the non-payment of notes payable to bearer which had been regularly issued by the bank, it appeared that the notes had been bonâ fide purchased by the plaintiff for value, but that before the plaintiff took them the notes had been altered by erasing the numbers upon them and substituting others, with the object of preventing the notes from being traced, as payment had been stopped and a notice issued specifying their numbers:—*Held*, reversing the decision of Lord Coleridge, C.J., that, although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, and that therefore the notes were vitiated, so that the plaintiff could not recover in his action on them against the bank. Suffell *v.* Bank of England **C. A. 555**

BANK—Sale of bank shares—Custom of Stock Exchange—Negligence of broker **546**
See Negligence.

BANKRUPTCY—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87—*Execution levied for a Sum, with Possession Money, above* 50*l.*—*Reduced by payment on account—Bankruptcy—Payment of Balance by Trustee.*] After seizure under a fi. fa. for a sum which was increased by possession money to an amount above 50*l.*, payments on account were made by the execution debtor, reducing the amount below 50*l.* The execution creditor knew and approved of such payments, and authorized the sheriff to give the execution debtor further time to pay the balance, so that a sale might be avoided.—Proceedings in bankruptcy having been

BANKRUPTCY—*continued.*
taken against the execution debtor, his trustee paid the balance to the sheriff, who gave possession of the goods to the trustee:—*Held*, that the execution creditor was entitled to the balance, as the proceeds of an execution for a sum not exceeding 50*l.* Mostyn *v.* Stock - - - 432

2. —— *Landlord and Tenant—Disclaimer of Lease by Trustee of Assignee—Liability of Lessee for Rent—Liability of Bankrupt's Surety.*] The plaintiff being lessee of a farm for a term of years assigned the lease to P., taking the covenant of the defendant as surety for the due payment of the rent to the lessor for the residue of the term. During the continuance of the term P. became bankrupt, and his trustee having obtained the requisite leave of the Court disclaimed all interest in the lease. Subsequently the lessor demanded from the plaintiff the half year's rent accruing after the bankruptcy. The plaintiff paid the rent and brought an action to recover the amount from the defendant under his covenant. Neither the plaintiff nor the defendant had entered upon or taken possession of the farm:—*Held*, by Manisty and Watkin Williams, JJ., that the plaintiff was entitled to recover. By Manisty, J., on the ground that the disclaimer operated only as a surrender so far as was necessary to relieve the bankrupt, his estate, and the trustee from liability without otherwise affecting third parties, and that the plaintiff as lessee remained liable for the rent and had his remedy over against the defendant as the bankrupt's surety. By Watkin Williams, J., solely on the authority of *East and West India Dock Co.* v. *Hill* (W. N. April 29, 1882). Harding *v.* Preece - - - - - 281

3. —— *Liquidation — Leasehold vested in Trustee on Appointment—Disclaimer—Election by Trustee to take Lease—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 17, 23, 24, 83, *subs.* 6, 89, 90, 125.] The leasehold estate of a bankrupt or debtor liquidating his affairs by arrangement vests absolutely in the trustee upon his appointment, and he has no right of election to accept or decline the leases, his only remedy being by disclaimer; and if he neglects or is unable to disclaim, he becomes personally liable in respect of the covenants contained in the leases as from the date of his appointment: but he is not liable for any breach of covenant happening before his appointment.—The plaintiff demised to M. a wharf for twenty-one years: the lease contained covenants for rent and repairs by the lessee. M. deposited the lease with S. as security for a debt. M. filed a petition for liquidation on the 8th of December, 1880, and the defendant was appointed trustee on the 3rd of January, 1881. The defendant never took possession of the wharf; but he negotiated with S. for the assignment of the lease to him: the negotiations proved abortive. The plaintiff served the defendant with a notice requiring him to disclaim; but the defendant failed to do this. The plaintiff then brought the present action to recover two quarter's rent, due respectively on the 25th of December, 1880, and on the 25th of March, 1881, and damages for breach of the covenant to repair:—*Held*, that the plaintiff could not recover from the defendant the quarter's rent falling due on the 25th of December, 1880, because the de-

BANKRUPTCY—*continued.*

fendant was not appointed trustee until the 3rd of January, 1881; but that the defendant was personally liable for the quarter's rent due on the 25th of March, 1881, and for breach of the covenant to repair, on the grounds, first, that by virtue of his appointment as trustee all the property of the liquidating debtor vested in him without any election on his part; and, secondly, if an election on his part was necessary, he had, by his conduct, elected to accept the lease. TITTERTON *v.* COOPER [C. A. 473

4. —— *Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 39, 49—*Set-off*—"*Mutual Dealings*" — *Unliquidated Damages* — *Fraudulent Representation on Sale of a Chattel.*] A claim for unliquidated damages for a fraudulent representation made by a bankrupt on the sale of a chattel is within the mutual credit clause (s. 39) of the Bankruptcy Act, 1869, and consequently may be set off in an action brought by the trustee for the unpaid price,—such fraudulent representation not being a mere personal tort, but a breach of the obligation arising out of the contract of sale. JACK *v.* KIPPING - - - - 113

5. —— *Principal and Agent—Property, passing of, in Goods bought by Agent—Trustee—Trust Funds misapplied, following Proceeds of—Moneys held in a Fiduciary Character—Advances for particular Purpose misappropriated — False Representation—Estoppel—Trustee in Bankruptcy takes Property subject to same Rights and Equities as Bankrupt—Reputed Ownership.* The defendants were brewers and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows:—F. occupied the malting premises, and took out the necessary licenses. It was his duty to buy barley in his own name as principal for cash, to send in to the defendants certain periodical accounts of the barley so bought from time to time, and the prices of the same, to submit samples to the defendants, and if the barley was approved of them to malt it and deliver the malt to the defendants. receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewers, and not the malting agents, provide the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shewn by the accounts sent in by F. of barley purchased, but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same, he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt upon credit. He

BANKRUPTCY—*continued.*

likewise from time to time sold barley which had been brought on to the maltings to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash, in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000*l.*, and malt to the value of about 35,000*l.* upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. He absconded and thereby committed an act of bankruptcy. Between the time of F.'s absconding and the time when he was adjudged a bankrupt, the defendants seized the barley and the malt left on his premises. The plaintiff, trustee in F.'s bankruptcy, sued the defendants for the value of the same:—*Held*, affirming the judgment of the Queen's Bench Division, that the plaintiff could not recover, on the ground that the relation between the defendants and F. was that of principals and agent, and that the property in the barley and the malt had vested in the defendants, and that the barley and the malt were not in the order and disposition of F. as the reputed owner thereof, it being notorious that "malting agents" are in many instances not the owners of the barley and malt on their malting premises; and also on the further ground that the monies advanced by the defendants to provide for the purchase of the barley were impressed with a trust; that even if the barley and the malt left on the premises of F. were not bought in accordance with the authority given to him, and the legal property in the same was not vested in the defendants but in F., nevertheless F. was a trustee for the defendants, to the extent of the sums advanced by them, of such barley and malt, the same being either the product of the trust monies, or in substitution for the barley in payment for which F. ought to have applied such trust-monies; that F. could not have set up his own breach of trust or have been heard to allege that the barley was bought otherwise than according to the authority given to him by the defendants; and that the plaintiff, as F.'s trustee in bankruptcy, could not in this respect stand in a better position than F. himself. HARRIS *v.* TRUMAN [C. A. 264

BARRATRY—Detention of ship for smuggling—Barratrous act of master - - 463
See INSURANCE (MARINE).

BASTARDY—*Affiliation Order—Arrears—Discretion of Justices to enforce Payment—7 & 8 Vict. c.* 101, *s.* 5—35 & 36 *Vict. c.* 65, *s.* 4.] By 7 & 8 Vict. c. 101, s. 5, all money payable under a bastardy order "shall be due and payable to the mother of the bastard child in respect of such time and so long as she lives. . . ." By 35 & 36 Vict. c. 65, s. 4, if it be made to appear to any one justice that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant, cause the putative father to be

BASTARDY—*continued.*
brought up before any two justices, and in case he neglect or refuse payment they may by warrant direct the sum to be recovered by distress, and may detain him until the return to the warrant of distress; but if on the return, or by admission, it it appear that no sufficient distress can be had, they may, if they see fit, cause him to be committed:—*Held*, by Grove, J., that the enforcement by the justices of the payment of sums due under such order is discretionary. By Huddleston, B., that the justices are bound to enforce it. DAVIES *v.* EVANS - - - - - 238

BILL OF EXCHANGE—*Illegality of Consideration — Compounding Felony.*] In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to shew that the creditor was thereby induced to abstain from prosecuting. *Ward* v. *Lloyd* (7 Scott, N.R. 499) followed. FLOWER *v.* SADLER - - - - - 83

BILL OF LADING — Collision — Negligence of servants - - - - 118
See SHIP.

BILL OF SALE—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 1—*Attestation by Solicitor of Grantee.*] The execution by the grantor of a bill of sale attested and registered under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31, s. 10), may be attested by the solicitor of the grantee. PENWARDEN *v.* ROBERTS - - - - 137

2. —— *Registration — Affidavit of Execution and Attestation—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.] The affidavit which is filed on the registration of a bill of sale must shew that the solicitor whose name appears as the attesting witness to the deed did in fact attest it, i.e. was present when it was executed by the grantor.—The affidavit is not sufficient if it only verifies the signature of the solicitor to the attestation clause.—*Sharpe* v. *Birch* (8 Q. B. D. 111) followed. FORD *v.* KETTLE - - - C. A. 139

BISHOP—Power to adjudicate upon ecclesiastical offence—Promotion of suit—Interest
See PROHIBITION. [454

BUILDING SOCIETY—*Building Society's Act.* 1874 (37 & 38 *Vict. c.* 72), *ss.* 15, 16, 43—*Rules—Borrowing Powers—Deposits or Loans in excess of Limits prescribed by the Act—Liability of Directors—Overdrawn Banking Account, whether a "Loan" within the Act.*] By s. 15 of the Building Societies Act, 1874, any society under the Act may receive deposits or loans at interest from the members or other persons within the limits provided by the section; and in a terminating society the total amount so received on deposit or loan and not repaid may either be a sum not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force.—By s. 16 the rules of every society shall set forth whether the society intends to avail itself of the borrowing powers contained in the Act, and if so within what limits not exceeding

BUILDING SOCIETY—*continued.*
the limits prescribed by the Act.—By s. 43, if any society receives loans or deposits in excess of the limits prescribed by the Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess.—Where by the rules of a terminating society the amount to be received upon deposit or loan was limited to an amount not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members:—*Held*, in an action against the directors under s. 43, that they were personally liable in respect of sums received by the society on deposit or loan in excess of the limit prescribed by the rules, notwithstanding that the amount received on deposit or loan did not exceed the other of the alternative limits prescribed by s. 15:—*Held*, also, that a loan at interest to the society from its bankers, secured by deposit of title-deeds, and made by allowing the society to overdraw its account at the bank, was a "loan" within the meaning of s. 15. LOOKER *v.* WRIGLEY. LEIGH *v.* WRIGLEY [397

CARRIER—*Liability for Delay in Transmission of Goods—Measure of Damage.*] On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendants for conveyance to W. station in Kent, where in the ordinary course they should have been delivered within twenty-four hours. By mistake they were forwarded to another place, and did not reach the W. station until the 4th of January, 1882, when, finding them to have become heated (through being packed in a damp state) and therefore unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed.—There being an admitted breach of duty on the part of the defendants, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiffs' own act in packing the rags in a damp state, without informing the defendants that special care was necessary. —Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods:—*Held*, that the ruling of the judge was correct, BALDWIN & CO. *v.* LONDON, CHATHAM, & DOVER RAILWAY CO. - - - - - 582

CASE STATED—Power to state case for opinion of Court—Reference to Local Government Board under local Act—Common Law Procedure Act, 1854 - - - 518
See ARBITRATION. 2.

CASES:

—— *Bower* v. *Peate* (1 Q. B. D. 321) considered
See SUPPORT. [441

—— *Collins* v. *Vestry of Paddington* (5 Q. B. D. 368) distinguished - - 621
See PRACTICE. 3.

—— *Cumber* v. *Wane* (Stra. 426) observed upon
See ACCORD AND SATISFACTION. [37

CASES—*continued.*

—— *Esdaile* v. *Visser* (13 Ch. D. 421) observed upon - - - - - 178
See DEBTORS ACT.

—— *Farebrother* v. *Gibson* (1 De G. & J. 602) distinguished - - - 616
See VENDOR AND PURCHASER.

—— *Freeth* v. *Burr* (Law Rep. 5 C. P. 208) approved - - - - - 648
See CONTRACT.

—— *George* v. *Skivington* (Law Rep. 5 Ex. 1) disapproved of - - - - 302
See NEGLIGENCE.

—— *Harper* v. *Scrimgeour* (5 C. P. D. 366) observed upon - - - - 178
See DEBTORS ACT.

—— *Heald* v. *Hanworthy* (10 Ex. 745) considered - - - - - 623
See PRINCIPAL AND AGENT. 2.

—— *Irvine* v. *Watson* (5 Q. B. D. 102) considered
See PRINCIPAL AND AGENT. 2. [623

—— *Jarmain* v. *Hooper* (6 M. & G. 287) distinguished - - - - 340
See SHERIFF.

—— *Jupp* v. *Cooper* (5 C. P. D. 26) considered
See PRACTICE. 2. [335

—— *Leyland* v. *Illingworth* (2 De. G. F. & J. 248) distinguished - - - 616
See VENDOR AND PURCHASER.

—— *Reg.* v. *Maidstone Union* (5 Q. B. D. 31) distinguished - - - - 522
See POOR-LAW.

—— *Royce* v. *Charlton* (8 Q. B. D. 1) overruled
See APPRENTICE. [636

—— *Sharpe* v. *Birch* (8 Q. B. D. 111) followed
See BILL OF SALE. 2. [139

—— *Sibree* v. *Tripp* (15 M. & W. 23) observed upon - - - - - 37
See ACCORD AND SATISFACTION.

—— *Smethurst* v. *Mitchell* (23 L. J. (Q.B.) 246) considered - - - - 623
See PRINCIPAL AND AGENT.

—— *Winterbottom* v. *Wright* (Law Rep. 5 Q. B. 184, 501) followed - - - 302
See NEGLIGENCE.

CERTIORARI — Discretion — Inquisition under Lands Clauses Act - - 741
See LANDS CLAUSES ACT. 2.

CHARTERPARTY—Construction—Final sailing from port - - - - 679
See SHIP. 2.

CHEQUE—Delivery of—Accord and satisfaction
See ACCORD AND SATISFACTION. [37

COMMITMENT, ORDER OF—Means of judgment debtor - - - - 178
See DEBTORS ACT.

COMPANY—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35, *Sched.* 1, *Table A., clause* 10—*Refusal to Register Transfer—Company's Lien on Shares.*] Table A in the 1st schedule to the Companies Act, 1862, contains regulations which may be adopted for the management of a company limited by shares. The 10th clause of the Table provides that "the company may decline to register any transfer of shares made by a member who is indebted to them":—*Held*, that this provision is not limited to cases where the member is indebted for calls or otherwise in respect of the particular share proposed to be transferred, but enables the company to decline to register the transfer if the member is indebted to them on any account whatever. EX PARTE STRINGER - - - 436

2. —— *Illegality—Unregistered Association of more than Twenty Members—Loan Society—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4—*Association having for its Object the acquisition of Gain.*] Persons to a number exceeding twenty had formed themselves into a society called the "Ipswich Mechanics Mutual Benefit Society." From the rules of the society it appeared that there were four hundred shares in the society of 10*l.* each, and that no member could hold more than twenty shares. The object of the society was to raise by monthly subscriptions and payments payable by the members in respect of their shares a fund for the purpose of making advances to members. From time to time as soon as the fund in hand amounted to a certain sum it was put up for sale by auction amongst the members, the highest bidder receiving the amount on loan from the society at interest. No member could receive on loan more than the nominal amount of the share or shares held by him, but ultimately every member, who did not withdraw his share under the rule providing for such withdrawal, was to have advanced or allotted to him out of the funds accruing to the society the sum of 10*l.* for every share held by him. The society was not registered under the Companies Act, 1862:—*Held*, that the society was illegal by reason of the provisions of the Companies Act, 1862, s. 4, which prohibits the formation of any company, association, or partnership consisting of more than twenty persons for the purpose of carrying on any business (other than banking) that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless registered as a company under the Act:—*Held* also, that a promissory note given by a member to the trustee of the society to secure a sum of money advanced to such member under the rules of the society was invalid, and no action could be maintained thereon. JENNINGS *v.* HAMMOND - - - - - - 225

CONTRACT—*Rescission of Contract—Refusal to be Bound—Winding-up—Set off of unliquidated Damages in Action.*] The defendants agreed to purchase from the M. Co. a large quantity of steel to be delivered on board ship in five monthly instalments, commencing with January, 1881, payment to be made within three days after receipt of the shipping documents. In January, 1881, the company delivered about half the first instalment, but before the payment became due a petition was presented on the 2nd of February to wind up the company. The defendants were advised by their solicitor that they could not without leave of the Court safely pay the company pending the petition, and asked the company to obtain an order of the Court to sanction their doing so. On the 10th of February the company replied that they should treat the refusal to pay as releasing the company from any further obligation to carry out the contract. On the 15th of February a winding-up

CONTRACT—*continued.*

order was made. The defendants' solicitor, on the 17th of February, wrote to the liquidator that the defendants claimed damages for non-delivery in January, and were prepared to accept and pay for all further deliveries without deducting damages if the payments were carried to a separate account subject to their claims for damages. He further suggested that the defendants would probably be willing to accept the January instalments and waive damages. The liquidator refused to make any further deliveries and commenced an action to recover the price of what had been delivered. The defendants set up a counter-claim for damages:—*Held*, reversing the decision of Lord Coleridge, C.J., that the defendants had not, by postponing payment under the erroneous advice of their solicitor, so shewn an intention no longer to be bound by the contract as to release the plaintiffs from further performance of it, and that the plaintiffs were liable for damages for non-delivery. —*Freeth* v. *Burr* (Law Rep. 9 C. P. 208) approved:—*Held*, also, that in an action by a liquidator for a debt, the defendant may set off a claim for unliquidated damages, and may without leave of the Court in the winding-up raise that defence by counter-claim. Mersey Steel and Iron Co. *v.* Naylor - - - - C. A. 648

—— By wife with husband—Agreement to assign rent estate—Heir-at-law - - 576
See Husband and Wife. 2.

COPYRIGHT—*Musical Composition—Dramatic Piece—Place of Dramatic Entertainment*—3 & 4 *Wm.* 4, *c.* 15, *ss.* 1, 2—5 & 6 *Vict. c.* 45, *ss.* 20, 21.] The sole liberty of performing a musical composition conferred by 5 & 6 Vict. c. 45, ss. 20, 21 (which incorporate the penalty clauses of the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15), upon the author or his assignee, extends to its performance (for payment) at all places of public entertainment, and is not confined to its performance at a place of dramatic entertainment.—The word "dramatic" in s. 1 of 3 & 4 Wm. 4, c. 15, has no particular signification. Wall *v.* Taylor. Wall *v.* Martin - - - 727

CORONER—*Misbehaviour in Office—Unnecessary Delay—Neglect or refusal to hold Inquest—Sudden Death without Information as to Cause—Discretion of Coroner as to holding Inquest.*] A coroner is not justified in delaying the inquest upon a dead body in a state of decomposition for so long a period as five days in order that the body may be identified, and buried and registered under the right name, and the mere fact that it has been placed in a mortuary can make no difference.—A coroner received from the proper police authorities a report with a view to an inquest, that a man within his district, aged sixty-one, had been found dead in his bed. It did not appear on the one hand that there had been any previous disease or illness, or on the other hand that there was any suspicion of violence, suicide, or crime. A medical man, moreover, refused to give a certificate of the cause of death, and the friends and relatives of the deceased made no objection to an inquest:—*Held*, that the coroner had, in the absence of further information as to the cause of death, no discretion to refuse to hold an inquest upon the ground that it was unnecessary. In re Hull - - 689

COSTS—When payable—Arbitration—Lands Clauses Act - - - 459
See Lands Clauses Act.

—— Reference—Award - - - 434
See Arbitration.

—— Security for—Married women suing separately - - - - 52
See Practice. 9.

—— Solicitor and client—County Court - 408
See Solicitor.

—— Viva voce examination—Power of master to order costs to be paid by party "in any event" - - - - 168
See Practice. 6.

COUNTY COURT—*Brighton Intercepting and Outfall Sewers Act*, 1870 (33 & 34 *Vict. c.* c)—*Mandamus to the Judge of the Sussex County Court to hear and determine a Dispute between the Sewers Board and the Hove Commissioners, under s.* 93 *of the Act.*] By s. 93 of 33 & 34 Vict. c. c., an Act the main object of which was the diverting of the sewage of Brighton from the existing storm-outfalls and carrying it to a distance from the town,—it was enacted that, "any dispute which might from time to time arise between the sewers board and any local authority with respect to carrying into effect the provisions of the Act or incidental thereto might, at the instance of either party, be referred to the judge for the time being of the Sussex county court, who should hear and determine such dispute, and whose decision should be final and conclusive."—A dispute having arisen between the sewers board and the Hove commissioners (one of the local authorities) with respect to the mode of carrying out the provisions of the Act, and the sewers board requiring it to be referred to the county court judge:—*Held*, that the county court judge was bound to hear and determine the matter, and that mandamus was the proper course to compel him to do so, and not a rule or order under 19 & 20 Vict. c. 108, s. 43,—this not being a matter within his ordinary jurisdiction, but a special duty imposed upon him by statute. Re Brighton Sewers Act - 723

—— Appeal—County court—Point not raised at the trial - - - - 386
See Master and Servant.

—— Costs—Solicitor and client - - 408
See Solicitor.

COURT OF RECORD — Municipal election — Amendment of orders - - 494
See Municipal Election.

COVENANT—Offensive trade - - 404
See Landlord and Tenant. 3.

—— Quiet enjoyment—Damages - - 128
See Vendor and Purchaser.

—— To pay rates—Metropolis Management Acts
See Landlord and Tenant. 2. [632

—— To settle after-acquired property - 337
See Husband and Wife.

CRIMINAL LAW—*Extradition*—"*Apprehension*"—*Person already in Custody—Arrest without a Warrant—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 8—*Court of Appeal—Jurisdiction—Criminal Matter—Habeas Corpus—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.] Under s. 8 of the Extradition Act, 1870, a fugitive

CRIMINAL LAW—*continued.*

criminal who is already in custody may be detained for an offence coming within the Act, even though he was originally arrested without any warrant. The word "apprehension" in s. 8 includes "detention."—*Semble*, per Brett, L.J., that a constable would be justified in arresting without a warrant a fugitive from a foreign country on reasonable grounds of suspicion that he has committed a crime which would be a felony if committed in the United Kingdom. Whether the Court of Appeal has any jurisdiction to entertain an appeal from the refusal of a Divisional Court to issue a writ of habeas corpus, on the application of a person who has been arrested for an alleged extradition crime, *quære*. The Queen *v.* Weil - - - - - **C. A. 701**

2. —— *Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 10, 15, 26—*Foreign Warrant of Arrest, Authentication of—Extradition of Subject of State not party to Extradition Treaty.*] An extradition treaty between the United Kingdom and the Netherlands provided that the governments, parties to the treaty, should reciprocally deliver up to each other any persons, who being accused of any of certain specified crimes committed within the jurisdiction of the party requiring the extradition should be found in the territories of the other party. The treaty further provided that neither of the contracting governments should be bound to deliver up its own subjects, and that a person arrested under the treaty in either country should be discharged, if within fourteen days a requisition should not have been made for his surrender by the diplomatic agent of "his" country;—*Held*, that the provisions for the extradition of criminals under the treaty were not confined to persons who were subjects of the state requiring the extradition, but applied to all persons who had committed any of the specified crimes within the jurisdiction of such state of whatever nationality they might be, except subjects of the state from which extradition was required. A document produced before a magistrate as the "foreign warrant" of arrest under s. 10 of the Extradition Act, 1870, was sealed with the seal of the department of justice at the Hague, and purported to be a copy of the record or minutes of a certain order or decree of the criminal court of justice there, setting forth the charges against the criminal whose extradition was sought, and authorizing proceedings against him and his arrest:—*Held*, that the production of such a document before the magistrate was a sufficient compliance with the provisions of s. 10 of the Extradition Act, 1870, which provides that the magistrate may commit the criminal to prison, if, inter alia, the foreign warrant authorizing his arrest is duly authenticated.—*Semble*, such document must be regarded as in the nature of an original for this purpose. The Queen *v.* Ganz **93**

3. —— *Unlawful Assembly—Meeting for lawful Purpose—Knowledge that others will commit a Breach of the Peace.*] The appellants assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those

CRIMINAL LAW—*continued.*

who opposed it:—*Held*, by Field and Cave, JJ., that they could not be rightly convicted of an unlawful assembly. Beatty *v.* Gillbanks - **308**

DAMAGES—*Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 2—*Action for causing Death through Negligence—Pecuniary Loss to surviving Relative, Evidence of.*] In an action brought, under 9 & 10 Vict. c. 93, for the benefit of the father of the deceased, evidence was given that the father who was fifty-nine years of age was nearly blind and injured in his leg and hands, and was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since:—*Held*, that there was evidence for the jury of pecuniary injury to the father from the son's death. Hetherington *v.* North Eastern Railway Co. - - **160**

—— Covenant for quiet enjoyment - **128**
See Vendor and Purchaser. 2.

—— Damage to estate of intestate arising out of injury to his person - - **110**
See Executor and Administrator.

—— Lord Campbell's Act—Widow of workman how far bound by his contract not to claim compensation - - **357**
See Master and Servant. 4.

—— Measure of—Goods consigned not of description ordered - - - **220**
See Principal and Agent.

—— Measure of—Delay in transmission of goods
See Carrier. [582

DEBTORS ACT, 1869—(32 & 33 *Vict. c.* 62), *s.* 5, *subs.* 2—*Order of Commitment—Means of Judgment Debtor.*] The plaintiff moved to commit the defendant for default in payment of a judgment debt of 29*l.* for goods supplied to him, the application being supported by an affidavit that the defendant kept up a large establishment, and was to all appearance a man of means. The defendant made an affidavit stating that he was an undischarged bankrupt, had no money, and was unable to pay the plaintiff's demand, and that his wife's property was settled to her separate use. Stephen, J., made an order committing the defendant for six weeks, or until payment, and this order was affirmed by a Divisional Court. The defendant appealed, and filed a further affidavit shewing that he was living in a very small way, and that the expenses of the establishment were all paid by his wife out of her separate estate. The Court of Appeal being satisfied that the defendant had no means of payment discharged the order for committal.—*Harper* v. *Scrimgeour* (5 C. P. D. 366), and the observation of James, L.J., in *Esdaile* v. *Visser* (13 Ch. D. 421) observed upon. Chard *v.* Jervis - - - - - **C. A. 178**

DESERTION—Of wife by husband—Settlement by residence - - - **522**
See Poor-law.

ECCLESIASTICAL LAW—Proceedings against clerk in orders—Bishop promoter of suit—Power to adjudicate - - **454**
See Prohibition.

ELEMENTARY EDUCATION—*Education Acts*, 1870, 1876, *and* 1880; 33 & 34 *Vict. c.* 75; 39 & 40 *Vict. c.* 79; 43 & 44 *Vict. c.* 23—*By-laws—Non-attendance of Child at School—Liability of Parent—"Reasonable Excuse."*] A by-law made under the Elementary Education Acts provided that, "The parent of every child of not less than five nor more than thirteen years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance. Reasonable excuses.—Any of the following reasons shall be a reasonable excuse, namely: (*a.*) That the child is under efficient instruction in some other manner; (*b.*) That the child has been prevented from attending school by sickness or an unavoidable cause; (*c.*) That there is no public elementary school open which the child can attend within two miles. . . ."—From the 18th of May to the 23rd of September, the respondent, an engine-driver, caused his child to be sent daily from home in time to arrive at school when it opened. He did not receive any notice that the child had not duly attended, except on two occasions. On both occasions the respondent's wife corrected the child. Nevertheless it often failed to attend school. At the hearing of an information, which charged that the respondent on and ever since the 18th of May had neglected the by-law in not causing his child to attend school, the justices found that he had done all that could reasonably be expected of him to secure the attendance of the child at school, and had reasonable grounds for believing, and did believe, the the child was duly attending school, and had, therefore, a "reasonable excuse" for not causing the child to attend school:—*Held*, that there may be other "reasonable excuses" within the meaning of the by-law besides the three reasons therein specified, and that the justices were right. Belper School Attendance Committee *v.* Bailey [259

2. —— 39 & 40 *Vict. c.* 79, *ss.* 8, 11, *subs.* 1; 41 *Vict. c.* 16, *Sched.—Attendance Order—"Full Time Employment."*] By 39 & 40 Vict. c. 79, s. 11, subs. 1, if the parent of any child above the age of five years "who is under this Act prohibited from being taken into full time employment," habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, a court of summary jurisdiction may order that the child do attend school:—*Held*, that subs. 1 refers to s. 8, which applies certain sections of the Factory Acts to the employment and education of children, and that, as those sections have been repealed by 41 Vict. c. 16, Sched., there can be no child within the terms of 39 & 40 Vict. c. 79, s. 11, subs. 1, "who is under this Act prohibited from being taken into full time employment," and therefore subs. 1 has ceased to operate. Saunders *v.* Crawford - - 612

ENTRY, RIGHT OF—Grant—Validity - 128
See Vendor and Purchaser. 2.

EVIDENCE—Sale of land—Intention of parties to conveyance - - - 506
See Prison.

EXECUTOR AND ADMINISTRATOR—*Damage to Estate of Intestate arising out of Injury to his Person—Medical Expenses—Loss of Wages.*] The plaintiff sued as the administratrix of her late husband, who, whilst crossing the defendants' railway at a level crossing was, through the negligence of the defendants, run over by an engine and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value:—*Held*, that the plaintiff could not sue in respect of damage to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable. Pulling *v.* Great Eastern Railway Co. - - - - - 110

EXTRADITION—Apprehension—Person already in custody - - - - 761
See Criminal Law.

—— Foreign warrant of arrest—Authentication
See Criminal Law. 2. [93

FELONY—Compounding—Bill of exchange 83
See Bill of Exchange.

FISHERY—*River in part navigable; but non-tidal.*] There can be no public right of fishing in non-tidal waters, even where they are to some extent "navigable rivers." Pearce *v.* Scotcher [162

FRAUD—Concealment—Statute of Limitations
See Limitations. [59

FRAUDS, STATUTE OF—29 *Car.* 2, *c.* 3, *s.* 4—*Right of Shooting—Right to take away Game shot—Interest in Land.*] A grant of a right to shoot over land and to take away a part of the game killed is a grant of an interest in land and within the Statute of Frauds. Webber *v.* Lee C. A. 315

GARNISHEE ORDER—Attachment of debts—Salary of secretary - - - 45
See Attachment of Debts.

GUARANTEE—Joint and several continuing—Death of co-surety - - - 783
See Principal and Surety.

HIGHWAY—Nuisance—Flap covering water-meter in street—Liability of vestry 451
See Metropolis Management Acts.

HUSBAND AND WIFE—*Married Woman—Liability of Separate Estate for Debts contracted before Marriage*—33 & 34 *Vict. c.* 93, *s.* 12—*Practice—Interpleader—Power of Court of Appeal—Orders I., r.* 2, *XL., r.* 10.] A married woman was sued without her husband for debts contracted before her marriage. By her ante-nuptial settlement it was agreed that all property coming to her or to her husband in her right during the coverture should be vested in two trustees, except jewels which were to be for her separate use. The creditors obtained judgment and issued execution against her separate estate. The sheriff seized jewels which belonged to her before her marriage, and an interpleader issue was ordered between her husband and the execution creditor. The jury found that the jewels belonged to the husband:—*Held*, by the Court of Appeal, on an application for a new trial, that the jewels belonged to the wife for her separate use, and that

HUSBAND AND WIFE—*continued.*
the execution creditor was entitled to seize them; —That the creditor was right in suing the wife without making her husband a party;—That the Court of Appeal had power under Order XL., rule 10, to order judgment in the interpleader issue to be entered for the execution creditor without directing a new trial. WILLIAMS *v.* MERCIER - - - - - C. A. 337

2. —— *Post-nuptial Contract—Contract by the Wife with the Husband in respect of her Real Estate*—3 & 4 *Wm.* 4, *c.* 74, *ss.* 77, 79.] A married woman immediately after the marriage, and in consideration thereof and of her husband undertaking the management of lands and tenements of which she was seized in fee, and of his paying off incumbrances and defraying the expense of managing and keeping the premises in repair, verbally agreed to convey the lands and tenements to him, and to settle them upon him absolutely, and to do all such acts as might be legally necessary for effectuating such conveyance and settlement. The husband performed his part of the agreement, but the wife died without having executed or acknowledged a deed:—*Held*, that this contract could not be set up as an equitable defence to a claim by her heir-at-law to recover the land. WILLIAMS *v.* WALKER - 576

—— "Desertion" - - - - - 522
See POOR LAW.

—— Married woman suing separately—Security for costs - - - - - 52
See PRACTICE. 9.

ILLEGALITY—Unregistered association of more than twenty members - - 225
See COMPANY. 2.

INQUEST—Refusal to hold - - - 689
See CORONER.

INSURANCE, MARINE—*Policy—Construction—Perils insured—Barratry—Warranty "free from Capture and Seizure"—Whether Barratry causing Capture within Warranty.*] In a time policy of marine insurance the ordinary perils insured against (including "barratry of the master") were enumerated, and the subject-matter of the insurance was warranted "free from capture and seizure." During the continuance of the policy in consequence of the barratrous act of the master, the ship was seized and detained for smuggling. In an action on the policy to recover expenses incurred by the owner in obtaining the release of the ship:—*Held*, affirming the judgment of the Queen's Bench Division, that the underwriter was not liable, as the warranty applied to capture or seizure from whatever cause, and therefore to seizure which was the result of barratry. CORY *v.* BURR - - - - C. A. 463

2. —— *Insurable Interest—Goods in which Property not passed to Assured—Non-appropriation of Specific Goods to Contract.*] The plaintiff had effected a "floating" policy of marine insurance on "goods," upon which he sued an underwriter under the following circumstances:—By contract of the 7th of January, D. & Co., sugar merchants in London, agreed to sell to B. & Co. 200 tons of sugar of a certain description to be shipped from Hamburgh to Bristol at the price of 1*l.* 1*s.* 9*d.* per cwt. net f. o. b. at Hamburgh; payment to be by cash, in London, in exchange for bill of lading. By contract of the 12th of January, D. & Co. agreed to sell a similar quantity of sugar to the plaintiff upon the same terms. B. & Co. entered into the contract of the 7th of January in order to enable themselves to execute a contract previously made by them with the plaintiff for the sale of the same quantity of sugar. Until after the loss hereinafter mentioned D. & Co. were not aware of B. & Co.'s contract with the plaintiff, nor was the plaintiff aware that D. & Co. were the shippers of the 200 tons contracted to be sold to him by B. & Co. The requirements of the Statute of Frauds has been complied with in the case of the above-mentioned contracts of the 7th and 12th of January, but not in the case of the contract between B. & Co. and the plaintiff, there being no sufficient memorandum of that contract within the statute.—D. & Co. advised their forwarding agents at Hamburgh that they had sold 400 tons of sugar for Bristol, and in pursuance of such advice, 3900 bags of sugar were shipped at Hamburgh, consigned to "order, Bristol," by such agents who forwarded the bills of lading for the sugar indorsed in blank to bankers in London with instructions to deliver them to D. & Co. against payment of amounts advanced in respect of the paice of the sugar paid to the manufacturer in Germany. The sugar so shipped was of the description specified by the above-mentioned contracts, but was insufficient in quantity by 100 bags to satisfy the two contracts of the 7th and 12th of January.—No appropriation of specific bags to each of the two contracts respectively was made by D. & Co. or their agents at the time of shipment. The ship on which such shipment was made was lost with her carge on the voyage. Before the news of the loss reached them, D. & Co. took up the bills of lading in due course, and they then apportioned the bags of sugar shipped between the contracts of the 7th and 12th of January, appropriating certain specific bags to the number of 2000 to the former and the remainder to the latter, and made out separate invoices in respect of each contract to B. & Co. and the plaintiff respectively, setting out the marks and numbers of the bags. The invoices were then posted by D. & Co. to B. & Co. and the plaintiff respectively, but before they were so posted the news of the loss of the ship had reached D. & Co. and the plaintiff. The plaintiff on learning of the loss, anticipating that sugar destined for him might have been shipped on board the ship, although without specific advice of any such shipment, declared on the ship in respect of 200 tons of sugar under the floating policy before-mentioned. The plaintiff and B. & Co. subsequently, on receipt of the invoices, respectively paid the contract price of and obtained the bills of lading for the sugars specified in their respective invoices. B. & Co. then forwarded the invoice received by them to the plaintiff, who thereupon paid them for the sugar included in that invoice and received the bills of lading in respect thereof. The plaintiff then further declared under the floating policy in respect of this last-mentioned sugar:—*Held*, in an action on the policy, that the plaintiff had no in-

INSURANCE, MARINE—*continued.*

surable interest in any of the sugar shipped as aforesaid, inasmuch as there had not been prior to the loss any appropriation of specific sugar to the respective contracts of the 7th and 12th of January:—*Held*, also, that although the plaintiff had no insurable interest in the sugar, he had an interest in "profits," but that this was not covered by a policy on "goods." Stock *v.* Inglis - 708

3. —— *Partial Loss—Insurance on Ship—Injury by Perils Insured against—Owner selling instead of repairing—Mode of estimating Liability of Underwriters.*] Where a ship that is insured is injured by perils insured against, and the owner instead of repairing, sells her during the continuance of the risk, the loss to be made good by the underwriters depends on the depreciation in the value of the ship and not on the amount that it would have cost to repair her with an allowance in respect of new materials for old.—The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values, if no other means can be found for arriving at the loss really sustained.—The depreciation in value is to be ascertained by taking the value of the ship, if sound, at the port of distress, and her value there in her damaged condition. To ascertain the liability of the insurers, the proportion so arrived at should be applied to the real value of the ship at the commencement of the risk, if the policy be open, or to the agreed value if the policy be valued:—So *held*, by Lindley, J., affirmed (except as to the mode of ascertaining the depreciation in value) on appeal by the majority of the Court; Jessel, M.R., and Cotton, L.J.; Brett, L.J., dissenting.—*Held*, by Brett, L.J., that the matter against which the owner was indemnified was the cost of repairs and not any diminution in the saleable value of the ship, and that therefore loss or gain by the sale of the ship was outside the contract of insurance and was not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship. Pitman *v.* Universal Marine Insurance Company - - - - - C. A. 192

4. —— *Policy and By-laws, construction of—Constructive total Loss—Insurance confined to "Absolute Damage caused by the Perils insured against."*] A policy of marine insurance effected by the plaintiff with the defendants, a mutual insurance company, incorporated certain by-laws of the company indorsed thereon. The policy (inter alia) expressed it to be thereby declared that the acts of the assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment. One of the by-laws provided that in the event of any ship being stranded or damaged, and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company should be deemed, or taken to be, an acceptance or recognition of any abandonment, of which the assured might have given notice to such

INSURANCE, MARINE—*continued.*

company, and the company under any circumstances should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured. The plaintiff's vessel was, while the policy was in force, damaged by perils of the sea to such an extent that the cost of repairing would have amounted to more than the ship would have been worth when repaired. The plaintiff within a reasonable time gave notice of abandonment:—*Held*, that a constructive total loss was covered by the policy and by the by-laws, and that the plaintiff could maintain an action. Forwood *v.* North Wales Insurance Co. [C. A. 732

—— Principal and agent—Undisclosed principal—Set-off - - - - - 530
See Principal and Agent. 3.

INTEREST—Justice of peace—Disqualification—Local Government Acts - - 394
See Local Government Acts. 2.

INTERPLEADER—Appeal from order on interpleader summons - - - - 55
See Practice. 7.

—— Power to enter judgment without ordering new trial - - - - - 337
See Husband and Wife.

JUDGMENT, ACTION UPON—Partnership—Proceeding against members of firm 355
See Practice. 8.

JUSTICE—Assize court—Income tax - 17
See Revenue.

JUSTICE OF PEACE—Member of sanitary committee—Disqualification—Local Government Acts - - - - 394
See Local Government Acts. 2.

LANDLORD AND TENANT — *Assignment of Yearly Tenancy — Assignment of Reversion — Action by Assignee of Reversion against original Tenant—Privity—4 Anne, c. 16, s. 9—8 & 9 Vict. c. 106, s. 6.*] S. made a parol demise of a tenement to M. from year to year at a rent. M. by deed assigned all his estate, interest, and term in the tenement to a third party, but S. refused to accept the third party as his tenant. Afterwards S. assigned his reversion to the plaintiffs, who never accepted the third party as their tenant, and brought an action against M. for rent in arrear:—*Held*, affirming the judgment of the Queen's Bench Division, that as no estate remained in M. after his assignment of his yearly tenancy, the Statute 4 Anne, c. 16, s. 9, did not apply; that there was no privity of estate or of contract between the plaintiffs and M., and therefore the action could not be maintained. Allcock *v.* Moorhouse - - - - - C. A. 366

2. —— *Covenant to pay Rates—Paving Rate—"Rates charged upon the Premises or on the Occupier in respect thereof"—Metropolis Management Acts—18 & 19 Vict. c. 120, s. 105—25 & 26 Vict. c. 102, s. 96—Practice—Appeal—Special Case—Appeal by Party not appearing at hearing.*] The lessee of a house in a new street within the metropolitan district for seven, fourteen, or twenty-one years, covenanted with his lessor to pay all rates and assessments taxed, rated, charged,

LANDLORD AND TENANT—*continued.*

assessed, or imposed upon the demised premises, or upon or payable by, the occupier or tenant in respect thereof:—*Held*, that the proportion of the expense of paving the new street assessed upon the demised house under 25 & 26 Vict. c. 102, s. 96, was not a rate payable by the tenant under this covenant.—Whether a party to a special case who does not appear at the hearing before the Divisional Court can appeal from the judgment, *quære*. ALLUM *v.* DICKENSON - - 632

3. —— *Covenant in Lease against carrying on Offensive Trade—Extra Rent reserved in case of Breach of such Covenant — Forfeiture.*] The defendants were assignees of the lease of certain premises which had been demised by the plaintiffs for a term of years, the reddendum being as follows: "yielding and paying a yearly rent of 30*l.* by equal quarterly payments" on the usual quarter days, "and a like yearly rent of 25*l.* by like equal payments in case any of the trades, occupations, or things hereinafter covenanted not to be carried on or done upon the said premises shall be carried on or done."—The lessees, among other usual covenants, covenanted not to carry on upon the premises certain specified trades or businesses, nor any offensive, noisome, or noisy trade or business whatsoever, nor do nor suffer to be done anything which might be or grow to the damage or annoyance of the lessors. The lease contained a condition of re-entry if the said yearly rent of 30*l.* or the said further rent of 25*l.*, in case the same should become payable, were in arrear, or if and whenever there should be a breach of any of the covenants thereinbefore contained on the part of the lessees.—The defendants having carried on upon the demised premises a business within the terms of the above-mentioned covenant, the plaintiffs sued to recover the premises upon a forfeiture of the lease: — *Held*, affirming the decision of the Queen's Bench Division, that the lease could not be construed as meaning that the defendants were entitled to carry on the business in question upon payment of the additional rent mentioned in the reddendum, and that the plaintiffs were entitled to re-enter under the condition for re-entry should they choose to exercise that option, instead of requiring the payment of the additional rent. WESTON *v.* MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT C. A. 404

4. —— *Relief against Forfeiture—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Pending Proceedings—Order LVIII. r.* 5—*Power of Court of Appeal.*] A landlord brought an action to recover the demised property under a proviso of re-entry for breach of a covenant to insure. The defendant claimed relief under statute 22 & 23 Vict. c. 35, s. 4. The plaintiff obtained judgment on the 4th of July, 1881. On the 4th of August the defendant appealed. A stay of proceedings was granted and continued, so that the plaintiff never obtained possession. On the 1st of January, 1882, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), came into operation, after which the appeal came on to be heard:—*Held*, that the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 2, is not confined to breaches taking place after the Act came into operation, but extends also to breaches committed before the Act, and to proceedings pending when the Act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that sub-section:—*Held*, also, that assuming the judgment of the Court below to have been correct according to the law as it then stood, the Court of Appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, since the general orders provide that appeals shall be by way of re-hearing, and give power to the Court of Appeal not merely to make any order which ought to have been made by the Court below, but to make such further or other order as the case may require. QUILTER *v.* MAPLESON - - - - C. A. 672

5. —— *Furnished House—Agreement to deliver up House and Furniture and pay Sum for Damage to be ascertained by Valuers—Condition Precedent.*] Where by a written agreement a tenant of a furnished house agrees at the expiration of the tenancy to deliver up possession of the house and the furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment if disputed to be settled by two valuers, the settlement of the amount of the payment by the valuers is a condition precedent to the right of the landlord to bring an action in respect of the dilapidations. BABBAGE *v.* COULBURN - - - 235

6. —— *Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79)—"*Lodger.*"] If the landlord, reserving a room in a house, lets the rest of it to a person, but retains such control and dominion over it as is usually retained by masters of houses let in lodgings, the relation of landlord and "lodger" may exist between the parties within the meaning of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), although the lodger has the right of exclusively occupying the greater part of the premises, and has separate and uncontrolled power of ingress and egress, and neither the landlord nor his agent sleeps or resides in the house, and the lodger acts as caretaker of the part reserved.—The existence of the relationship of landlord and lodger is a question of fact. NESS *v.* STEPHENSON - - - - 245

—— Bankruptcy—Disclaimer by trustee of assignee of lessee—Liability of bankrupt's surety - - - - 281
See BANKRUPTCY. 2.

—— Bankruptcy—Lease—Period of vesting in trustee - - - - 473
See BANKRUPTCY. 3.

—— Obligation to fence roof - - - 80
See NEGLIGENCE. 2.

LANDS CLAUSES ACTS, 1845, 1869 (8 *Vict. c.* 18, *ss.* 34, 36; 32 & 33 *Vict. c.* 18)—*Settlement of Purchase-money by Arbitration—Costs of Arbitration—Payment due before Conveyance.*] Where the amount of compensation payable to the owner of lands taken under the Lands Clauses Acts, 1845 and 1869, is settled by arbitration, and the amount and the costs of the arbitration are awarded to the owner, the taxed costs of the arbi-

LANDS CLAUSES ACTS, 1845, 1869—*continued.*
tration become payable to him within a reasonable time, and the execution of the conveyance by him of the lands taken is not a condition precedent to payment of such costs. Capell *v.* Great Western Railway Co. - - - - 459

LANDS CLAUSES ACT, 1845 (8 & 9 *Vict. c.* 18) —*Compensation—Matter not legally the subject of Compensation—Application to quash Inquisition—Certiorari, Writ of—Discretion.*] Application having been made to the High Court of Justice for a writ of certiorari, to bring up and quash the proceedings upon an inquisition before the sheriff as to the amount of compensation to be awarded to a claimant under the Lands Clauses Consolidation Act, 1845, on the ground that the jury in assessing the compensation had taken into consideration matters which were not legally the subject of compensation; it was proved that the applicants for the writ had allowed five months to expire without taking any objection to the proceedings:—*Held*, that as the time allowed for setting aside an award made under the provisions of the above-mentioned Act had expired before the application was made, the writ of certiorari ought not to be granted. The Queen *v.* Sheward [C. A. 741

LIEN—Shares—Company—Refusal to register transfer - - - - 436
See Company.

LIMITATIONS—*Reply of concealed Fraud and absence of reasonable Means of Discovery.*] In an action to recover by way of damages money lost by the fraudulent representations of the defendant, a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was *held* good by the Court of Appeal (Lord Coleridge, C.J. and Brett, L.J., Holker, L.J., dissenting), affirming the judgment of Field, J. Gibbs *v.* Guild - - - - - C. A. 59

—— Adverse possession - - - 424
See Railway. 2.

LOCAL GOVERNMENT ACTS—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Premises "adjoining or abutting on" a newly made Street.*] A. was the owner of three houses fronting a street called York Place, and adjoining or abutting at the rear upon a footpath at the end of a street called St. Julian Street, which formed a cul-de-sac. The ground at the back of these houses was five feet above the level of St. Julian Street, and the wall, which was the property of A., was about twelve feet high on the outside. There was no access from A.'s premises to St. Julian Street. —*Held*, that his premises "adjoined or abutted on" St. Julian Street within the Act, and consequently that he was chargeable with his proportion of the expenses of paving, &c., that street, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150. Newport Sanitary Authority *v.* Graham - - - - - 183

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 258—*Justices of the Peace—Bias—Disqualification—Town Council—Urban Sanitary Authority.*] By s. 258 of the Public Health Act, 1875, "no justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority."—In the borough of Wakefield the sanitary committee of the town council, who were the local authority under the Public Health Act, 1875, passed a resolution directing the town clerk to prosecute S. for exposing for sale meat unfit for human food, contrary to the provisions of the Act, and at the hearing of an information laid in pursuance of this resolution S. was convicted before four justices of the borough, who imposed a penalty upon him. One of the justices was a member of the sanitary committee, and had been present at the meeting at which the resolution was passed:—*Held*, that s. 258 did not remove the disqualification which attached to the justice by reason of his having acted as a member of the sanitary committee in directing the prosecution, and that a rule for a certiorari to bring up and quash the conviction must be made absolute. The Queen *v.* Lee - - - - 394

3. —— *Streets—Paving—Expenses—Recovery of—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 252, 257, 268—*Appeal to Local Government Board—Prohibition.*] Under 38 & 39 Vict. c. 55, s. 150, notice was given by an urban authority to the owner of premises fronting a street to pave part of it, and on his default, the authority executed the work, and their surveyor gave him notice of apportionment of the expenses for which the owner was liable, and demand was made on him for the amount.—Under s. 268 he, deeming himself aggrieved by the "decision" of the authority, addressed a memorial by way of appeal to the Local Government Board stating the grounds of his complaint.—On a rule for a prohibition to the Local Government Board:—*Held*, that the notice to pave and the notice of apportionment were not, but the demand of payment was, within the terms of s. 268, a "decision" from which an appeal lay by memorial to the Local Government Board, and the owner having some right of appeal, although the memorial did not accurately state the ground of complaint, the Court would not, even if it could, prohibit the Local Government Board from entertaining the appeal. The Queen *v.* Local Government Board - 600

—— Reference to Local Government Board under local Act—Power to state case for opinion of Court—Common Law Procedure Act, 1854 - - - 518
See Arbitration. 6.

LODGER—Lodger's Goods Protection Act 245
See Landlord and Tenant. 6.

LORD CAMPBELL'S ACT - - - 160
See Damages—Lord Campbell's Act.

MASTER AND SERVANT—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 7—*Notice of Action, Sufficiency of—Cause of Injury—County Courts—County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6—*Appeal—Point not raised at Trial—Condition Precedent.*] In an action to recover compensation for injuries under the Employers' Liability Act, 1880, the plaintiff's notice of action stated that she was injured in consequence of the

MASTER AND SERVANT—*continued.*

defendants' negligence in leaving a certain hoist in their warehouse unprotected whereby her foot was caught in the casement of the hoist and crushed. At the trial, the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing the plaintiff, a young girl, to go in the hoist alone:—*Held*, that the notice of action sufficiently stated the "cause of the injury" within s. 7 of the Employers' Liability Act, 1880.—It is a condition precedent to the right to appeal under s. 6 of the County Court Acts, 1875, that the question of law upon which it is desired to appeal should have been raised before the county court judge at the trial. CLARKSON *v.* MUSGRAVE - - 386

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—*Railway Company—Negligence of a Person "in Charge of a Train upon a Railway."*] H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance:—*Held*, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5, of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). COX *v.* GREAT WESTERN RAILWAY CO. - - - - - 106

3. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 7—*Notice of Action.*] The notice of action under s. 7 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), need not be expressed in strictly technical language: it is enough if it substantially conveys to the mind of the person to whom it is given, the name and address of the person injured, and the cause and date of the injury.—A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg:"—*Held*, that having regard to the proviso at the end of s. 7 the defect in the notice did not render it invalid. STONE *v.* HYDE - 76

4. —— *Negligence—Common Employment—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1—*Contract by Workman not to recover Compensation under the Act, whether Valid—Contract against Public Policy—Injury resulting in Death—Lord Campbell's Act* (9 & 10 *Vict. c.* 93)—*Widow of Workman, whether bound by his Contract not to claim Compensation.*] It is competent to a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880.—By s. 1 of the Employers' Liability Act, 1880, where personal injury is caused to a workman in certain specified cases, the workman, or, in case the injury results in death, his legal personal representatives and any person entitled in case of death "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."—A workman having contracted with his employer for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the Act for personal injury whether resulting in death or not:—*Held*, that s. 1 only affected the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, and therefore did not render the workman's express contract not to claim compensation invalid.—*Held*, also, that the contract was not against public policy, and that the workman's widow, suing for damages under Lord Campbell's Act, was bound by it. GRIFFITHS *v.* EARL OF DUDLEY. - - - - - 357

MAYOR'S COURT, LONDON — *Practice — New Trial—Mayor's Court Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*) *ss.* 10, 22.] Where a rule has been obtained to enter a nonsuit or for a new trial in the Mayor's Court, London, under s. 22 of 20 & 21 Vict. c. clvii., it is not competent to the unsuccessful party afterwards, even with the leave of the judge, to move the Divisional Court under s. 10. MEARS *v.* CHITTICK. - - 35

METROPOLIS MANAGEMENT ACTS—*Highway—Nuisance—Flap covering a Water Meter in a Street — Improper state of Flap — Liability of Vestry*—18 & 19 *Vict. c.* 120, *ss.* 96, 116.] A water meter, which was the property of a water company and used for measuring the water supplied by the company to the defendants, the vestry of a parish, for watering the streets, was placed by the defendants in a box of theirs sunk in the footway of one of the streets and covered with an iron flap. The defendants as such vestry were by s. 96 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), the surveyors of highways, and by s. 116 authorized to cause the streets in their parish to be watered. The plaintiff, whilst walking along the street stepped on the iron flap and, by reason of its having been worn smooth and become slippery and dangerous, he fell and was injured. In an action by him against the defendants for damages for such injury:—*Held*, that though the defendants might not be liable as surveyors of the highway for negligence in not keeping the iron flap in a proper state, they were in their capacity as the authority for watering the street, in which capacity they had placed the iron flap there.—*White* v. *Hindley Local Board* (Law Rep. 10 Q. B. 219) affirmed. BLACKMORE *v.* VESTRY OF MILE END OLD TOWN - - - - C. A. 451

2. —— *Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Paving new Street—Owner of Land bounding or abutting on new Street—Railway in Cutting—Bridge carrying new Street over Railway.*] A line of railway was situate in a deep cutting at a place where a road passed over the line. The road was carried over the line on a bridge which was supported on stone piers erected by the railway company upon the slope of the cutting on either side of the line. The bridge had on either side a parapet wall, which was of brickwork, and went along the whole length of it, from one of the said piers to the other. The district board of works paved the road between the said walls of

METROPOLIS MANAGEMENT ACTS—*continued.*
the bridge, and on an information under s. 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), against the railway company, for not contributing to such paving, the magistrate having found such road to be a new street:—*Held*, that the railway company were, in respect of the parapet wall, the owners of land bounding or abutting on such street within the meaning of the 77th section, and liable, therefore, to contribute to such paving. Board of Works for Hackney *v.* Great Eastern Railway Co. - - - - C. A. 412

3. —— *Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 102), *s* 231—*Metropolis Local Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*Justice of the Peace—Appeal—Quarter Sessions—Whether Appeal lies to Quarter Sessions from Order of Justice for Demolition of Building.*] An appeal to quarter sessions will not lie against the order of a justice directing the demolition of buildings under s. 75 of the Metropolis Local Management Amendment Act, 1862.—By s. 231 of the Metropolis Local Management Act, 1855, any person aggrieved by any adjudication of a justice "with respect to any penalty or forfeiture under the provisions of the Act" may appeal to quarter sessions.—By s. 75 of the Metropolis Local Management Amendment Act, 1862 (which, by s. 110, is to be construed as one Act with the Act of 1855), where a building is erected beyond the general line of buildings in a street without the consent of the Metropolitan Board of Works, a justice of the peace is empowered, upon complaint made and after inquiry held as the Act directs, to order the owner or occupier to demolish the building, and in default of compliance with the order the vestry of the parish or Board of Works for the district shall demolish the building, and may remove and sell the materials, and recover the expenses of so doing from the owner or occupier:—*Held*, that the order of a justice directing the demolition of a building under s. 75 of the Act of 1862, was not an adjudication "with respect to a penalty or forfeiture" within s. 231 of the Act of 1855, and therefore that no appeal to quarter sessions would lie against the order. The Queen *v.* Justices of Middlesex. Re Elsdon - - - - - 41

MUNICIPAL ELECTION — *Corrupt Practices* (*Municipal Elections*) *Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 14, *sub-s.* 5, 20, 22)—*Expenses of Election Court—Amendment of Order—Court of Record—Certificate of Commissioners of Treasury—Rate—Mandamus.*] Upon the trial of a petition against the return of a borough councillor under the Corrupt Practices (Municipal Elections) Act, 1872, the barrister in delivering judgment said that he found the councillor guilty of personal bribery, and that all the costs of the inquiry were to be borne by him, and made an order in writing for the payment by the councillor of certain costs under s. 19 of the Act. The written order made no provision for the remuneration and allowances to the barrister and other persons under s. 22. The Lords Commissioners of the Treasury paid the amount of such remuneration and allowances and certified the payment to the borough treasurer, and required him to repay them the amount out of the borough fund or rates as provided by s. 22. A rate was accordingly made and levied. The commissioners, afterwards, on receiving from the barrister a letter that he had always intended to visit all the costs upon the councillor, and had said so in giving judgment, cancelled their certificate, and the borough corporation abandoned their rate and returned the sums levied to the ratepayers. Afterwards the commissioners, finding that the barrister had made no written order for the payment of the remuneration and allowances under s. 22, issued a fresh certificate requiring the borough treasurer to repay them out of the borough fund or rates the amount of such remuneration and allowances. These facts being raised upon the return to a mandamus commanding the treasurer to repay the commissioners out of the borough fund or rate, and the corporation to cause such repayment:—*Held*, that no valid order was made by the barrister for the payment of such allowances and remuneration under s. 22; that the election court for the trial of petitions under the Act was by virtue of s. 14, sub-s. 5, a court of record, and that neither the Queen's Bench Division nor the Court of Appeal on the return to the mandamus could amend the barrister's order so as to make it include the payment of such remuneration and allowances; that the act of the commissioners in certifying was not a judicial act, and that they had the power to make the second certificate; and were entitled to a peremptory mandamus compelling the treasurer to repay to them the amount of such remuneration and allowances out of the borough fund or rate, and compelling the corporation to order such amount to be levied by a borough rate. The Queen *v.* Mayor of Maidenhead - C. A. 494

MUSICAL COMPOSITION—Copyright—Place of public entertainment - - 727
See Copyright.

MUTUAL CREDIT—Damages for fraudulent representation - - - 113
See Bankruptcy. 4.

NEGLIGENCE—*Breach of Duty—Defective Article, Supply of—Injury to Stranger—Liability of Person supplying a defective Article causing Injury to Stranger.*] The defendant supplied and erected a staging round a ship under a contract with the shipowner. The plaintiff was employed by the shipowner to paint the ship, and in the course of the work fell from the staging and was injured by reason of a defect in its condition. In an action for damages:—*Held*, that the defendant had no duty towards the plaintiff to supply a reasonably safe staging, and therefore was not liable.—*Winterbottom* v. *Wright* (10 M. & W. 109) followed: *George* v. *Skivington* (Law Rep. 5 Ex. 1) disapproved of Heaven *v.* Pender - 302

2. —— *Landlord and Tenant — Licensee — Obligation to Fence—Private Way.*] The defendant was the landlord of a house which was let out in apartments to several tenants, each of whom had the privilege of using the roof (which was flat and covered with lead, having an iron rail on its outer edge), for the purpose of drying

NEGLIGENCE—*continued.*

their linen; the access to the roof being by means of a low door at the stair-head about two feet from the rail. The plaintiff, the occupier of one of the rooms, went upon the roof for the purpose of removing some linen, when, his foot slipping, and the rail being out of repair (and known by the landlord to be so), he fell through to the court-yard below, and was injured:—*Held*, that the mere licence to the lodgers to use the roof as a drying-ground imposed no duty upon the defendant to fence it or to keep the fence in repair. IVAY *v.* HEDGES - - - - **80**

3. —— *Stockbroker—Sale of Joint Stock Bank Shares—Name of Shareholder—30 & 31 Vict. c. 29, s. 1—Custom of Stock Exchange.*] The defendant, a stockbroker, who had undertaken to sell shares of a joint stock bank for the plaintiff, a shareholder, sold them to a jobber on the Stock Exchange and sent an advice note of such sale to the plaintiff, but in accordance with the custom of the Stock Exchange, the bought and sold notes between the defendant and the jobber omitted to state the name of the registered proprietor of the shares as required by 30 & 31 Vict. c. 29, s. 1, by reason of which the contract for sale was void, and the bank having stopped, and an order for its winding-up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, and the plaintiff remained the holder of the shares:—*Held*, that the defendant had committed a breach of duty in not making a valid contract for sale, notwithstanding the custom of the Stock Exchange to disregard the said statute, as such custom was both unreasonable and illegal, and that for such breach of duty the plaintiff was entitled to recover from the defendant by way of damages the price at which the shares had been sold. NEILSON *v.* JAMES - **C. A. 546**

—— Death through negligence—Pecuniary loss to surviving relative - - **160**
See DAMAGES—LORD CAMPBELL'S ACT.

—— Lord Campbell's Act—Widow of workman, how far bound by his contract not to claim compensation - - **357**
See MASTER AND SERVANT. 4.

NOTICE—Of action—Employers' Liability Act
See MASTER AND SERVANT. [**76, 386**

—— Publication of poor-rate - - - **47**
See POOR-RATE.

NUISANCE—Flap covering water meter in street—Liability of vestry - - **451**
See METROPOLIS MANAGEMENT ACTS.

OFFICIAL REFEREE—Form of report - **736**
See PRACTICE. 10.

PARTNER—Judgment against firm—Action upon judgment - - - - **355**
See PRACTICE. 8.

PLEADING—Delivery after time—Judgment on admissions - - - - **170**
See PRACTICE. 11.

POOR LAW—24 & 25 *Vict. c.* 55, *s.* 3—"*Desertion*" *of Wife by her Husband—Settlement by Residence—Misconduct of Wife.*] By 24 & 25

POOR LAW—*continued.*

Vict. c. 55, s. 3, "where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years in such a manner as would if she were a widow render her exempt from removal, she shall not be liable to be removed from the parish where she shall be resident, unless her husband return to cohabit with her."—One night in June, 1873, the pauper, a married woman, who had been drinking at a public-house with a man named Wyatt, with whom her husband reasonably suspected her of too much intimacy, came home the worse for drink and found the door of her husband's house locked. She forced her way in; and in the morning, after some words, her husband threatened to lock her in. He then went out to his work, and when he came back he found his wife absent, and that part of his furniture and clothes had been carried away. The pauper took a room elsewhere, and shortly afterwards went away with Wyatt, with whom she lived in adultery until his death in 1879. After Wyatt's death, the pauper wrote to her husband asking him to receive her back. He took no notice of her letter, and if she had gone back to him he would not have received her.—In August, 1881, she became chargeable to the parish of Liverpool as a pauper lunatic, and an order of justices was made for her removal to her husband's parish, which order was confirmed by the quarter sessions. Upon appeal against the last-mentioned order:—*Held*, that the above facts disclosed no reasonable evidence of desertion of the wife by the husband, within the statute.—*Reg.* v. *Maidstone Union* (5 Q. B. D. 31) distinguished. THE QUEEN *v.* COOKHAM UNION **522**

POOR LAW—*Removal of Pauper Wife and Children—Settlement—Derivative Birth*—39 & 40 *Vict. c.* 61, *s.* 35—*Divided Parishes Act*, 1876.] An order for the removal of a pauper wife and of her three legitimate children, aged respectively five years, three years, and one year, to an union on the ground that the settlement of her husband was the birth settlement of his father within the union, having been made and appealed against, the birth settlement of the husband's father in the union was proved, but no other settlement, either of the husband or of his father, being set up, the order was quashed by the Court of quarter sessions.—*Held*, that under the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61, s. 35), the wife took the settlement of her husband, and as it could not be shewn what settlement the children derived from their parent "without inquiring into the derivative settlement of such parent," such children should be deemed to be settled in the parishes in which they were respectively born. THE QUEEN *v.* GUARDIANS OF POOR OF BRIDGNORTH - **765**

—— Board of guardians for collection of rates—Negligence of overseers - - **683**
See PRINCIPAL AND SURETY.

POOR-RATE—*Notice—Publication—Extrâ-parochial Places—Publication of Poor-rate in Parishes where no Church or Chapel*—17 *Geo.* 2, *c.* 3, *s.* 1—7 *Wm.* 4 *& 1 Vict. c.* 45, *s.* 2—20 *Vict. c.* 19, *s* 1.] By 17 Geo. 2, c. 3, s. 1, public notice of every rate for the relief of the poor shall be given in the parish church the next Sunday after the allowance

POOR-RATE—*continued.*

of the rate by the justices, "and no rate shall be esteemed or reputed valid and sufficient so as to collect or raise the same unless such notice shall have been given;" and by 7 Wm. 4 & 1 Vict. c. 45, a written notice, to be affixed on the doors of all the churches or chapels in the parish, is substituted for any notice theretofore by any law or statute given in churches or chapels. By 20 Vict. c. 19, s. 1, every extrâ-parochial place wherein no rate is levied for the relief of the poor shall for all purposes of assessment to the poor-rate and the relief of the poor "be deemed a parish."—The overseer of a parish which, before the passing of 20 Vict. c. 19, was an extrâ-parochial place, made a rate for the relief of the poor, but did not publish any notice of the rate within the parish, in which there was no church or chapel:—*Held*, that the rate could not be collected. The Queen *v.* Dyott - - - - - 47

2. —— *Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67)—*Rateable Hereditaments—Bookstalls on a Railway Platform—Exclusive Occupation—Exclusive Enjoyment—Licence or Demise.*] By indenture the South Western Railway Company granted to Smith & Son (therein called "the tenants") for seven years "the sole and exclusive licence and privilege to vend, sell, lend, and exhibit for sale and loan, newspapers, books, periodicals, stationery, &c., and such other like articles required for the convenience of passengers by railway as should be approved by the secretary of the company, at all their stations," &c.; and also full liberty for the tenants, subject to the approval of the engineer of the company, to erect and place bookstands, &c., on the platforms for exhibiting and keeping their books, &c., and to post and exhibit advertisements and placards on the station walls; and also full and free ingress and egress at all reasonable times for the tenants, their servants and agents, to and from the several stations for the purposes of the grant. The persons employed by Smith & Son were to be under the control of the station-master and liable to immediate removal from the station in case of insobriety or misconduct. S. & Son were to pay the company certain fixed monthly rents, and also a percentage (quarterly) on the gross amounts received by S. & Son for the posting of the advertisements, &c.,—with a proviso that, in case the rent or the quarterly payments should be in arrear for fourteen days after notice, the same should be recoverable by the company, in addition to any other remedies, "by distress as in the case of rent in arrear." And it was provided that the tenants should not vend or offer for sale, or exhibit or publish, any books or advertisements or placards of an indecent, immoral, or seditious character, or which should be forbidden by the company; and should abide and observe the regulations from time to time made by the company touching the placing on the platforms any of the necessary bookstands; and the company warranted to the tenants "the quiet and peaceable enjoyment and benefit thereby granted for the period and upon the terms and stipulations and in manner aforesaid."—S. & Son erected bookstands upon four several platforms at the Waterloo station, and had the exclusive possession and use of them; and these bookstalls were closed at night with shutters, and were locked up, the keys being kept by their servants. No rights of ingress or egress to and from the station, or of access to the bookstalls, were exercised by S. & Son or their agents or servants, except under the provisions and for the purposes of the indenture. The company were assessed to the poor-rate for the station generally:—*Held*, that S. & Son had no "exclusive occupation" of any portion of the platforms, so as to render them liable to be rated in respect of these bookstalls. Smith *v.* Parish of Lambeth - - 585

PRACTICE—*Power of Court of Appeal to amend Record of Trial—Rules of Court, Orders LVIII. r. 5: LIX. r. 2—Condition rendered impossible by Defendant—"Title to be approved by my Solicitor."*] At the trial of an action the jury found certain issues in favour of the plaintiff, and the judge reserved judgment. The verdict was entered as a general verdict for the plaintiff, but the judge notwithstanding the verdict gave judgment for the defendant.—On an appeal by the plaintiff from the judgment, the Court of Appeal amended the record by entering the verdict for the plaintiff on the issues only, and affirmed the judgment.—The plaintiff's claim was for commission on the sale of a piece of land by A. to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A'.s title was never submitted to the defendant's solicitor:—*Held*, that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him as it was unreasonable for him to disapprove. Clack *v.* Wood [C. A. 276

2. —— *Attachment—Notice of Motion—Order XLIV. r.* 2.] Under Order XLIV., rule 2, a motion for an attachment for removing goods out of the custody of the sheriff can only be made on notice.—*Jupp* v. *Cooper* (5 C. P. D. 26) considered. Eynde *v.* Gould - - - - 335

3. —— *Case stated by Arbitrator—Appeal—Interlocutory or Final Order.*] An arbitrator, under an order of reference, stated a case for the opinion of the Court, which provided that, if the opinion of the Court should be one way the case was to be referred back to the arbitrator; if the other way judgment was to be entered for the defendant with costs. A divisional court decided in favour of the plaintiffs, and referred the case back to the arbitrator. The defendant appealed:—*Held*, first, that an appeal could be brought from the order; secondly, that it was a final order, and that the appeal must be entered in the general and not in the interlocutory list.—*Collins* v. *Vestry of Paddington* (5 Q. B. D. 368) distinguished. Shubrook *v.* Tufnell - C. A. 621

4. —— *Costs—Counsel at Chambers—Solicitor and Client—Taxation—Special Allowances—Rule* 14.] The Supreme Court Special Allowances, Rule 14, that "as to counsel attending at judges' chambers no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend," applies to taxation of

PRACTICE—*continued.*

costs between solicitor and client as well as between party and party. IN RE CHAPMAN - **254**

5. —— *Costs of Interlocutory Proceeding — Order for Payment—Default of Payment—Staying Proceedings.*] The plaintiff obtained a verdict in an action, and the Queen's Bench Division having refused to grant a rule nisi for a new trial, the defendant obtained a rule absolute in the Court of appeal. By the rule the plaintiff was ordered to pay the costs of the applications, which he failed to do:—*Held* by Mathew and Cave, JJ., that the defendant was not entitled to an order to stay the proceedings until the costs were paid. MORTON *v.* PALMER - - - - - **89**

6. —— *Insufficient Answers to Interrogatories —Vivâ voce Examination—Costs—Order for Payment "in any Event"—Jurisdiction of Master—Order XXXI., r.* 10—*Order LIV., r.* 2—*Order LV., r.* 1.] Where, in consequence of the party interrogated answering insufficiently, an order was made by the master for his examination vivâ voce before a special examiner:—*Held*, that there was power under Order XXXI., r. 10, and Order XV., r. 1, or the general practice of the Court, to make it a term of the order that the costs of, and occasioned by, the application should be paid by the party interrogated "in any event." VICARY *v.* GREAT NORTHERN RAILWAY CO. - - **168**

7. —— *Interpleader — Summary Decision— Reference by Judge at Chambers to the Court— Appeal—Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *ss.* 14, 17.] A judge at chambers referred an interpleader summons to a Divisional Court. The Court barred the claimant and decided the case without ordering an interpleader issue:—*Held*, that such a decision was given in exercise of the summary jurisdiction of a Court or judge under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 14, and was therefore final and without appeal. TURNER *v.* BRIDGETT - - - - - **C. A. 55**

8. —— *Judgment against Firm—Partners— Action on Judgment—Execution—Order XLII., r.* 8.] Where judgment has been recovered against a partnership firm in the name of the firm, the plaintiff may bring an action on the judgment against the individual members of the firm, and is not confined to the remedy given by Order XLII. r. 8, with respect to the issue of execution. CLARK *v.* CULLEN - - - - **355**

9. —— *Married Woman suing separately— Security for Costs—Order XVI., rule* 8.] The rule as to giving security for costs before a married woman can be allowed to sue separately under Order XVI., rule 8, is the same as in the ordinary case of giving security for costs by an appellant, and therefore she is to give such security if she has no available means to pay the costs if she loses, but not where she has such means. BROWN *v.* NORTH - - - - - **C. A. 52**

10. —— *Official Referee—Form of Report— Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 56, 57.] A referee under the Supreme Court of Judicature Act, 1873, s. 57, is not bound to give his reasons for his findings, he may simply find the affirmative or the negative of the issues, and the issues in an action cannot be sent back to him for re-trial or further consideration merely on the ground that his report does not set out the reasons for his findings. MILLER *v.* PILLING [**C. A. 736**

11. —— *Pleading — Time — Reply, Delivery after Time—Judgment on Admissions in Pleadings —Order XXIX., r.* 12—*Order XL., r.* 11.] The plaintiff delivered his reply after three weeks had elapsed from delivery of the statement of defence, and subsequently the defendant, treating the facts stated in the defence as admitted, under Order XXIX., rule 12, by reason of the plaintiff's failure to reply in time, gave notice of motion for judgment under Order XL., rule 11: —*Held*, that, the reply having been actually delivered before the notice of motion was given, the defendant was not entitled to judgment. GRAVES *v.* TERRY - - - - - **170**

12. —— *Staying Proceedings—Order directing that One of Two Cross Actions be stayed, and that a Counter-claim be delivered in the other— Burden of Proof—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.] When an order is made under the Supreme Court of Judicature Act, 1873, s. 24, sub-s. 7, to stay one of two cross actions between the same parties arising out of the same matter, the action brought against the party on whom the burden of proof lies ought to be stayed, and the action brought by him ought to be allowed to proceed, the other party to the litigation being at liberty to raise by defence, set-off, and counter-claim, all questions intended to be raised by him in the action which is stayed.—In an action, commenced on the 28th of November, 1881, the plaintiffs, Messrs. T., claimed 7000*l.*, the balance of the price of a steamship built by them for the defendants, a railway company, and certain other sums as extras; in a cross-action, commenced on the 30th of November, 1881, the railway company as plaintiffs claimed a return of all the monies paid by them to Messrs. T. on account of the steamship and 15,000*l.* damages, and in the alternative 50,000*l.* damages. Upon the facts the burden of proof lay upon the railway company. The Queen's Bench Division ordered that the action brought by the railway company should be stayed, with liberty to raise their claim by way of counter-claim in the action brought by Messrs. T., on the ground that Messrs. T. had been the first to commence legal proceedings:—*Held*, reversing the decision of the Queen's Bench Division, that as the burden of proof lay upon the railway company, the action brought by the railway company should be allowed to proceed, Messrs. T. being at liberty to raise all questions by counter-claim, and that the action brought by Messrs. T. should be stayed. THOMSON *v.* SOUTH EASTERN RAILWAY COMPANY. SOUTH EASTERN RAILWAY COMPANY *v.* THOMSON - **C. A. 320**

13. —— *Reference to Arbitration — Stay of Proceedings—Railway Passengers Assurance Company's Act*, 1864 (27 & 28 *Vict. c. cxxv.*] By the Act regulating an insurance company it was provided that any question arising under any policy should, if either the company or the assured or the representatives of the assured required it, be referred to arbitration under the Act, and it was

PRACTICE—*continued.*

provided that if a policy-holder or his representatives commenced any action a judge might, on the application of the company "upon being satisfied that no sufficient reason exists why the matter cannot be or ought not to be referred to arbitration" stay proceedings in the action. An action having been commenced by the representatives of a policy-holder to recover the sum assured, the company disputing their liability, the company obtained an order to stay proceedings in the action in order that the dispute might be referred to arbitration:—*Held*, that the burden lay on the plaintiffs to shew that some sufficient reason existed why the dispute should not be referred to arbitration, and not on the company to shew that no such reason existed, and that as no such reason had been shewn the order to stay proceedings was right. Hodgson *v.* Railway Passengers Assurance Company - - - C. A. 188

14. —— *Summons — Substituted Service — Party to Action evading Service — Solicitor — Charging Order*—23 & 24 *Vict. c.* 127, *s.* 28.] A sum of money having been paid into Court for the benefit of the defendant, M., his solicitor, obtained a charging order for costs upon it under 23 & 24 Vict. c. 127, s. 28. The costs had been taxed ex parte. M. then took out a summons to shew cause why the sum of money paid into Court should not be paid out to him in part satisfaction of his taxed costs. This summons could not be served upon the defendant, who appeared to be wilfully evading service of it. L. had acted for the defendant after M. had ceased to do so, and H. had introduced the defendant to M.:—*Held*, that substituted service of the summons should be allowed, that a notice calling upon the defendant to appear in one month should be put up at the master's office, and served upon L. and H., and advertised in the *Times* newspaper, and thereupon, if the defendant did not appear, an order might be made on the summons. Hunt *v.* Austin, Ex parte J. N. Mason - C. A. 598

—— Appeal—Party not appearing at hearing *See* Landlord and Tenant. 2. [632

—— Interpleader — Power to enter judgment without ordering new trial - 337 *See* Husband and Wife.

—— New trial—Mayor's Court - - 35 *See* Mayor's Court.

—— Variance between rules of Common Law and Admiralty Courts—Collision 118 *See* Ship.

PRINCIPAL AND AGENT — *Commission Agent and his Principal, Relation between—Goods consigned not of Description ordered—Measure of Damages.*] The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. The defendants upon such orders purchased and shipped to the plaintiff opium which they erroneously supposed to be of the description ordered, but which was really of an inferior description. The plaintiff sought to recover as damages in an action against the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendants, on the ground that

PRINCIPAL AND AGENT—*continued.*

the relation between the defendants as commission agents and himself was that of vendor and vendee of the opium:—*Held*, that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered. Cassaboglou *v.* Gibbs 220

2. —— *Discharge of Principal by mode of dealing with Agent—Delay — Ship's Husband.*] In order to discharge a principal from his liability for a debt contracted by his agent the principal must shew that the creditor has himself misled him into supposing that he has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition. Mere delay in enforcing payment from the agent will not be sufficient for the purpose.—The plaintiff sold stores for a ship to T., who was ship's husband and managing owner. The defendant was part owner of the ship, and was also interested jointly with T. in the adventure for which the ship was being fitted out. The plaintiff applied to T. for payment, but did not obtain it. Three months after the goods were supplied, and again two years after that, the defendant settled accounts with T. and gave him credit for the price of the goods, supposing that they had been paid for. More than three years after the goods had been supplied, T. having become bankrupt, the plaintiff for the first time applied for payment to the defendant and brought his action for the debt:—*Held*, that there had been no such conduct on the part of the plaintiff as would discharge the defendant from his liability.—*Irvine* v. *Watson* (5 Q. B. D. 102), *Heald* v. *Kenworthy* (10 Ex. 745), and *Smethurst* v. *Mitchell* (28 L. J. (Q. B.) 241) considered. Davison *v.* Donaldson [C. A. 623

3. —— *Undisclosed Principal—Foreign Consignor—Commission Agent—Marine Insurance—Right to Policy-money—Set-off—Privity of Contract—Right to sue—Conflict of Laws.*] The defendants, an English firm, traded with D., a Spanish shipping agent at Havannah. The plaintiffs, who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party who was alluded to as the "interesado," but the name of the plaintiffs was not disclosed.—The defendants effected an insurance in London on the ship in the name of themselves and for the benefit of all parties interested.—The ship having been lost, the policy-money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole of the money after deducting the premiums and expenses. The defendants claimed a lien for the balance of their general account due from D.:—*Held*, first, that the questions must be determined according to English law, and not according to the law of Spain, the law of Spain being material only with regard to the nature and extent of the authority given by the plaintiffs to D.—Secondly, that the insurance was for the benefit of the plaintiffs, subject to the lien of the defendants and D. in respect of the cargo consigned to the defendants.—Thirdly, that there

PRINCIPAL AND AGENT—*continued.*

was privity of contract between the plaintiffs and defendants, and that the plaintiffs had a right of action against the defendants for the balance of the policy-moneys.—Fourthly, that the defendants had no lien on the money, or right of set-off, for the balance of their general account due from D.—The unsigned underwriters' slips constitute only a provisional insurance, not binding in law on the underwriters; and the rights of the parties must be determined by the policies when executed. Maspons y Hermano *v.* Mildred, Goyeneche & Co. - - - - - - **C. A. 530**

—— Liability of principal for act done by servant or agent—Adjoining owner - **441**
See Support.

—— Right to follow trust funds—Bankruptcy
See Bankruptcy. 5. [264

PRINCIPAL AND SURETY—*Bond to Guardians for collection of Rates—Overseers.*] The defendant as surety gave a bond to the guardians of the poor for the M. Union conditioned for the due discharge by C. of his duties as collector of poor rates for the Parish of N. C. absconded, having embezzled part of the rates and allowed others to be lost by not applying for them. The guardians sued the defendant for the loss. The defendant admitted his liability as to the sums embezzled, but disputed his liability as to the sums lost by C.'s negligence, on the ground that the loss would not have occurred if C. had been called upon to account as he ought to have been. It appeared that no negligence could be imputed to the guardians, but there appeared some ground to believe that if the overseers of the parish of N. had discharged their statutory duties with reasonable care the loss would not have occurred:—*Held*, affirming the decision of Watkin Williams, J., that the plaintiffs were entitled to recover from the defendants the monies lost through failure of C. to collect them, for that there had been no negligence on the part of the plaintiffs, and they were not answerable for the negligence of the overseers. The Guardians of Mansfield Union *v.* Wright - - - - - **C. A. 683**

2. —— *Joint and Several continuing Guarantee—Discharge of Surety—Death of Co-Surety—Liability of surviving Co-surety.*] The death of one of the co-sureties under a joint and several continuing guarantee does not by itself determine the future liability of the surviving co-surety.—Claim, that by a bond G. and H., as principals, and the defendant and W., since deceased, as sureties, became jointly and severally bound to the plaintiffs, subject to a condition that if the obligors should repay to the obligees all sums of money to be by them advanced to G. and H., so that the defendant and W. should not be responsible for more than 250*l.*, the bond should become void: that W. died before action: that after his death the plaintiffs made advances to G. and H.: that G. and H. liquidated their affairs by arrangement pursuant to the Bankruptcy Act, 1869: that more than 250*l.* was owing from them to the plaintiffs.—Defence, that shortly after the decease of W. the plaintiffs had notice of the existence of his will, and that executors thereunder had proved it:—*Held*, upon demurrer, that the defence was bad. Beckett *v.* Addyman - **783**

PRISON—*Land bought for the purpose of rendering Prison more commodious or safe—Prison Commissioners—Prison Act*, 1865 (28 & 29 *Vict. c.* 126), *ss.* 4, 5, 8, 23, 44—*Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *ss.* 5, 48, 60—*Evidence—Sale of Land—Intention of Parties to Conveyance.*] In 1867 the Justices of the county of M. bought land covered with houses subject to leases for long terms, several years of which remained unexpired. The land and the houses were conveyed to the clerk of the peace for the county, "upon trust for Justices of the county of M., for the purposes of the Prison Act, 1865, and upon or for no other trust, intent, or purpose whatsoever." The land and houses were never used as part of the prison. An action having been brought to try whether the reversion in the land and houses was in the Prison Commissioners or the justices, the defendant proposed to adduce as evidence the minutes of the proceedings of the justices in order to shew that the land had been bought for the purpose of rendering the prison more commodious or safe:—*Held*, that the reversion in the land and the houses standing thereon had passed to the Prison Commissioners by virtue of the Prison Act, 1877.—Per Jessel, M.R., that the conveyance having been executed, the minutes of the proceedings of the justices were inadmissible as evidence shewing the purpose for which the land and the houses had been bought. The Prison Commissioners *v.* The Clerk of the Peace for Middlesex [C. A. 506

PROCTOR—Unqualified person—Penalty **1**
See Solicitor. 2.

PROHIBITION—*The Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86), *ss.* 3, 5, 7, 11, 13, 24—*Proceedings against Clerk in Orders—Bishop Promoter of Suit—Power to adjudicate thereon—Interest—Costs.*] Under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), which empowers a bishop to hear and determine a charge against a clerk in orders of having committed an ecclesiastical offence, if the bishop be not patron of any preferment held by the party accused, the mere fact that the bishop is, by his secretary, promoter of the suit does not, in the absence of any personal interest or bias, disqualify him from adjudicating upon the case. The Queen *v.* Bishop of St. Albans - - - - - **454**

—— Local Government Acts—Liability for costs of sewering and paving—Appeal to Local Government Board - - **600**
See Local Government Acts. 3.

RAILWAY—*Carrier—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Alternative Rates—Special Condition excluding all Liability.*] The plaintiff, a fish merchant, signed a contract by which, in consideration of the defendants, a railway company, carrying his fish at a rate one-fifth less than the ordinary rate, he agreed to free the defendants from "all liability for loss or damage by delay in transit or from whatever cause arising." Owing to pressure of business the fish of the plaintiff and others was some hours late in starting, and reached London too late for the market:—*Held*, that, as the defendants carried at alternative rates, the condition was just and reasonable, although it was absolute

RAILWAY—*continued.*

and contained no exception, and would in the absence of alternative rates have been unjust and unreasonable. Brown *v.* Manchester, Sheffield, and Lincolnshire Railway Co. - 230

2. —— *Mileage Charges — Lump Charges—Statute — Repeal by Implication — Government Duty—"Tolls"—Omission to put to Milestones—Railways Clauses Consolidation Act*, 1845, *s.* 95.] The W. Company by their original Act were authorized to charge reasonable rates for the conveyance of passengers. By a subsequent Act the company were empowered to extend their line, and to charge a lump sum for carrying passengers over that extension. A third and later Act allowed the W. Company to amalgamate with another company, provided that they reduced their charges to the same scale as that of the other company. That scale was one penny a mile for each third-class passenger. The plaintiff travelled over the line of the W. Company with a third-class ticket, and was charged as his fare at more than the rate of one penny a mile. In the course of his journey he travelled over the extension. The W. Company also charged the plaintiff with the Government duty:—*Held*, that the W. Company were not entitled to charge the plaintiff more than one penny per mile, but that they were entitled to charge him with the Government duty. —By one of the clauses in an Act relating to the W. Company they were forbidden to take tolls, unless milestones were maintained along the line; and another Act relating to the W. Company incorporated the Railways Clauses Consolidation Act, 1845, which, in s. 95, contains a similar provision:—*Held*, that the word "tolls" related to tolls properly so called, and did not extend to charges for carrying passengers in the company's own carriages. Brown *v.* Great Western Railway Co. - - - - - C. A. 744

3. —— *Lands Clauses Act*, 1845 (8 *Vict. c.* 18, *s.* 127)—*Land required for Purpose of Undertaking—Adverse Possession—Statutes of Limitations*, 3 & 4 *Wm.* 4, *c.* 27, *s.* 7; 37 & 38 *Vict. c.* 57, *s.* 1 —*Evidence.*] The mere fact that land of a railway company is required for the purposes of their undertaking, and is not superfluous land, does not prevent an occupier who has exclusive adverse possession for twelve years becoming thereby entitled to the land under the Statutes of Limitations. Bobbett *v.* South Eastern Railway Co. [C. A. 424

—— Bookstands on platform—Poor-rate - 585
See Poor-rate. 2.

RATE—Borough—Municipal election—Expenses of Court - - - - 494
See Municipal Election.

—— Waterworks company—"Rateable value"
See Waterworks Company. [145

REAL ESTATE—Contract by wife to assign to husband—Heir-at-law - - 576
See Husband and Wife. 2.

REVENUE—*Income Tax—Justices—Assize Court—Police Stations*—5 & 6 *Vict. c.* 34—16 & 17 *Vict. c.* 34—*Schedules A & B.*] The justices of a county, in the due exercise of statutory powers, erected assize courts with the usual rooms and offices, and a county police station with the usual

REVENUE—*continued.*

offices and accommodation for constables living there, and for prisoners. The courts and police stations were contained in one building, and were used for the administration of justice, and for police purposes. Parts of the building were also used for holding county and committee meetings and various other occasional purposes, but no rent or profit was received or made in respect of the building or any part of it:—*Held*, that income tax was not payable in respect of the building under schedules A. or B. of the Income Tax Acts. Coomber *v.* Justices of Berks - - 17

REVERSION—Action by assignee of reversion
See Landlord and Tenant. [366

RULES—Order I., r. 2 - - - 337
See Husband and Wife.

—— Order XVI., r. 8 - - - 52
See Practice. 9.

—— Order XXIX., r. 12 - - - 170
See Practice. 11.

—— Order XXXI., r. 10 - - - 168
See Practice. 6.

—— Order XL., r. 10 - - - 337
See Husband and Wife.

—— Order XL., r. 11 - - - 170
See Practice. 11.

—— Order XLII., r. 8 - - - 355
See Practice. 8.

—— Order XLIV., r. 2 - - - 335
See Practice. 2.

—— Order LIV., r. 2 - - - 168
See Practice. 6.

—— Order LV., r. 1 - - - - 168
See Practice. 6.

—— Order LVIII., r. 5 - - - 276
See Practice.

—— Order LIX., r. 2 - - - 276
See Practice.

SESSIONS—Appeal—Metropolis Local Management Acts—Order for demolition 41
See Metropolis Management Acts.

SET-OFF—Principal and agent — Undisclosed principal - - - - 530
See Principal and Agent.

SEWERS BOARD—Arbitration—Judge of county court - - - - 723
See County Court.

SHERIFF—*Liability of Execution Creditor for wrongful Seizure under fi. fa.—Implied Authority of Solicitor — Direction to levy on particular Goods.*] Whether a seizure of particular goods under a fi. fa. was directed by the execution creditor, so as to make him liable for the act of the sheriff, is a question of fact.—It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa. to direct the sheriff to seize particular goods.—*Jarmain* v. *Hooper* (6 Man. & G. 827) distinguished. Smith *v.* Keal - - - - - 340

SHIP—*Bill of Lading—Exceptions—Collision—Negligence of Servants—Variance between Rules of Admiralty and Common Law Courts—Judicature Act*, 1873, *s.* 25, *sub-s.* 9.] The plaintiffs shipped goods on board the defendant's vessel, the *Crown*

SHIP—*continued.*

Prince, under a bill of lading which contained an exception of, amongst other things, "collision" and "accidents, loss, or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company, in navigating the ship." In the course of the voyage the *Crown Prince* came into collision with another vessel of the defendants, the *Atjeh*. The collision was due to negligence, for which the *Atjeh* was mainly in fault, but the *Crown Prince* was also in some degree to blame:—*Held*, that the defendants not having shewn that the loss was occasioned wholly by the neglect or default of their servants on the *Crown Prince* were liable:—*Held*, also, that s. 25, sub-s. 9, of the Judicature Act, 1873, is confined to cases in which a variance existed before the passing of the Act between the rules in force in the Common Law and the Admiralty Courts, and did not apply to limit the liability of the defendants in the present case to one half the loss of the plaintiffs. CHARTERED MERCANTILE BANK OF INDIA *v.* NETHERLANDS INDIA STEAM NAVIGATION CO. - - - - - - 118

2. —— *Charterparty—Final sailing from last Port.*] By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom." The vessel was loaded at Penarth Dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cable, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom:—*Held*, affirming the decision of Lopes, J., that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returing, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that the one-third of the freight was payable. PRICE *v.* LIVINGSTONE - - - C. A. 679

3. —— *Detention of British Ship—"Unfit to proceed to Sea without serious Danger to human Life"—Reasonable and Probable Cause for Provisional Detention of Ship"—Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *ss.* 6, 10.] The plaintiff was the owner of a British ship named the *L.*, which was at the British port of S., and was intended to be employed in the foreign cattle trade. Certain surveyors of the Board of Trade reported in doubtful terms that owing to her unusual proportions the *L.* was an unsafe ship. The Board of Trade thereupon ordered the *L.* to be provisionally detained. A court of survey was held as to the condition of the *L.*, and the members thereof reported that the *L.* was not unsafe, and that she ought not to have been detained. The *L.* was accordingly released. The plaintiff then brought an action against the secretary of the Board of Trade to recover compensation for the loss to him by reason of the provisional detention. At the trial it was admitted that the *L.* was a safe ship. The judge in substance directed the jury to consider whether it was reasonable in the Board of Trade to detain the *L.* for survey without a direct affirmation by their surveyors that in their opinion she was unsafe:—*Held*, a misdirection; for the proper question to be left to the jury was whether the facts with regard to the *L.* as she lay at S., which would have been apparent to a person of ordinary skill on examining her and inquiring about her, would have given him reasonable and probable cause to suspect her safety and to detain her for survey and inquiry. THOMPSON *v.* FARRER - - - - C. A. 372

SHOOTING, RIGHT OF—Statute of Frauds 315
See FRAUDS, STATUTE OF.

SOLICITOR—*Client—Costs in County Court—Work done before and after Action—Scale of Costs and Charges in Actions under* 20*l.—County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 8; 19 & 20 *Vict. c.* 108, *s.* 36.] The scale of costs and charges in actions in the county court under 20*l.* framed in pursuance of 38 & 39 Vict. c. 50, s. 8, does not prevent a solicitor from recovering charges other than those specified in the scale for work done out of Court before and after the commencement of an action, although there has been no agreement in writing for further costs under 19 & 20 Vict. c. 108, s. 36. RE EMANUEL - - - - 408

2. —— *Proctor—Unqualified Person acting as a Proctor*—6 & 7 *Vict. c.* 73, *s.* 2—23 & 24 *Vict. c.* 127, *s.* 26—*Legal Practitioners Act*, 1877 (40 & 41 *Vict. c.* 62), *ss.* 2, 3—*Rules of Probate Division.*] The defendants, who were law stationers and were not qualified as solicitors or proctors, had been accustomed, upon the instruction of solicitors, to take to the registry of the Probate Division original wills, and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the defendants had been accustomed to communicate the question to the solicitors instructing them. The wills, engrossments, and affidavits were left in the solicitors' names. The defendants only charged for their clerk's time:—*Held*, that the defendants had not acted as solicitors or proctors, and were not liable to the penalties imposed by 23 & 24 Vict. c. 127, s. 26. LAW SOCIETY *v.* SHAW. THE SAME *v.* WATERLOW C. A. 1

—— Authority to direct sheriff to seize particular goods—Liability of execution creditor
See SHERIFF. [340

—— Client—Substituted service on solicitor—Practice - - - - 598
See PRACTICE. 14.

STATUTES:

32 Hen. 8, c. 9, s. 2 - - - 128
See VENDOR AND PURCHASER.

29 Car. 2, c. 3, s. 4 - - - 315
See FRAUDS, STATUTE OF.

STATUTES—*continued.*

4 Ann. c. 16, s. 9 - - - - 366
See LANDLORD AND TENANT.

17 Geo. 2, c. 3, s. 1 - - - - 47
See POOR-RATE.

3 & 4 Will. 4, c. 15, ss. 1, 2 - - 727
See COPYRIGHT.

3 & 4 Will. 4, c. 27, s. 7 - - - 424
See RAILWAY.

3 & 4 Wm. 4, c. 74, ss. 77, 79 - - 576
See HUSBAND AND WIFE. 2.

7 Wm. 4 & 1 Vict. c. 45, s. 2 - - 47
See POOR-RATE.

3 & 4 Vict. c. 86, ss. 3, 5, 7, 11, 13, 24 - 454
See PROHIBITION.

5 & 6 Vict. c. 35 - - - - 17
See REVENUE. 2.

5 & 6 Vict. c. 45, ss. 20, 21 - - 727
See COPYRIGHT.

6 & 7 Vict. c. 73, s. 2 - - - 1
See SOLICITOR.

7 & 8 Vict. c. 101, s. 5 - - - 238
See BASTARDY.

8 Vict. c. 18, ss. 34, 53 - - - 459
See LANDS CLAUSES ACT.

—— —— —— - - - - 741
See LANDS CLAUSES ACT.

8 Vict. c. 20, s. 95 - - - - 744
See RAILWAY COMPANY. 2.

8 & 9 Vict. c. 106, s. 6 - - - 128
See VENDOR AND PURCHASER. 2.

—— —— —— - - - - 366
See LANDLORD AND TENANT.

9 & 10 Vict. c. 93 - - - - 357
See MASTER AND SERVANT. 4.

—— —— s. 2 - - - - 160
See DAMAGES—LORD CAMPBELL'S ACT.

10 Vict. c. 17, s. 68 - - - 145
See WATERWORKS.

16 & 17 Vict. c. 34 - - - - 17
See REVENUE.

17 & 18 Vict. c. 31, s. 7 - - - 230
See RAILWAY.

18 & 19 Vict. c. 120, ss. 96, 116 - - 451
See METROPOLIS MANAGEMENT ACTS.

—— —— s. 105 - - - - 632
See LANDLORD AND TENANT.

—— —— s. 331 - - - - 41
See METROPOLIS MANAGEMENT ACTS. 3.

19 & 20 Vict. c. 108, s. 36 - - - 408
See SOLICITOR.

20 Vict. c. 19, s. 1 - - - - 47
See POOR-RATE.

20 & 21 Vict. c. clvii., ss. 10, 22 - - 35
See MAYOR'S COURT.

23 & 24 Vict. c. 126, ss. 14, 17 - - 55
See PRACTICE.

23 & 24 Vict. c. 127, s. 26 - - - 1
See SOLICITOR. 2.

23 & 24 Vict. c. 127, s. 28 - - - 598
See PRACTICE. 14.

24 & 25 Vict. c. 55, s. 3 - - - 522
See POOR LAW.

STATUTES—*continued.*

24 & 25 Vict. c. 89, s. 35 - - - 436
See COMPANY.

25 & 26 Vict. c. 89, s. 4 - - - 225
See COMPANY. 2.

25 & 26 Vict. c. 102, s. 75 - - - 41
See METROPOLIS MANAGEMENT ACTS. 13.

—— —— s. 77 - - - - 412
See METROPOLIS MANAGEMENT ACTS. 2.

—— —— s. 96 - - - - 632
See LANDLORD AND TENANT. 2.

27 & 28 Vict. c. cxxv. - - - 188
See PRACTICE. 13.

28 & 29 Vict. c. 126, ss. 4, 5, 8, 23, 44 - 506
See PRISON.

30 & 31 Vict. c. 29, s. 1 - - - 546
See NEGLIGENCE.. 3.

32 & 33 Vict. c. 18 - - - - 459
See LANDS CLAUSES ACT.

32 & 33 Vict. c. 62, subs. 2 - - 178
See DEBTORS ACT..

32 & 33 Vict. c. 67 - - - - 585
See POOR-RATE.

32 & 33 Vict. c. 71, ss. 17, 23, 24, 83, subs. 6, 89, 90, 125 - - - 473
See BANKRUPTCY. 3.

32 & 33 Vict. c. 71, ss. 31, 39, 49 - 113
See BANKRUPTCY. 4.

—— —— s. 87 - - - - 432
See BANKRUPTCY.

33 & 34 Vict. c. 30, s. 1 - - - 45
See ATTACHMENT OF DEBTS.

33 & 34 Vict. c. 52, s. 8 - - - 701
See CRIMINAL LAW.

—— —— ss. 10, 15, 26 - - - 93
See CRIMINAL LAW. 2.

33 & 34 Vict. c. 75 - - - - 259
See ELEMENTARY EDUCATION.

33 & 34 Vict. c. 93, s. 12 - - - 337
See HUSBAND AND WIFE.

33 & 34 Vict. c. c. s. 93 - - - 723
See COUNTY COURT.

34 & 35 Vict. c. 79 - - - - 245
See LANDLORD AND TENANT. 6.

35 & 36 Vict. c. 60, s. 14, subs. 5, 20, 22 494
See MUNICIPAL ELECTION.

35 & 36 Vict. c. 65, s. 4 - - - 238
See BASTARDY.

36 & 37 Vict. c. 66, s. 24, sub-s. 7 - 320
See PRACTICE. 12.

—— —— ss. 19, 47 - - - 701
See CRIMINAL LAW.

—— —— ss. 56, 57 - - - 736
See PRACTICE. 10.

37 & 38 Vict. c. 72, ss. 15, 16, 43 - - 397
See BUILDING SOCIETY.

38 & 39 Vict. c. 50, s. 6 - - - 386
See MASTER AND SERVANT.

—— —— s. 8 - - - - 408
See SOLICITOR.

38 & 39 Vict. c. 55, s. 150 - - 183
See LOCAL GOVERNMENT ACTS.

STATUTES—*continued.*
38 & 39 Vict. c. 55, ss. 150, 252, 257, 268 600
See LOCAL GOVERNMENT ACTS. 3.
—— —— s. 258 - - - - 394
See LOCAL GOVERNMENT ACTS. 2.
38 & 39 Vict. cclxiii. - - - 518
See ARBITRATION. 2.
38 & 39 Vict. c. 63, ss. 6, 12, 13, 14, 20, 21 - - - - - 172
See ADULTERATION.
39 & 40 Vict. c. 79 - - - - 259
See ELEMENTARY EDUCATION.
—— —— ss. 8, 11, sub-s. 1 - - 612
See ELEMENTARY EDUCATION. 2.
39 & 40 Vict. c. 80, ss. 6, 10 - - 372
See SHIP. 3.
40 & 41 Vict. c. 21, ss. 5, 48, 60 - - 506
See PRISON.
40 & 41 Vict. c. 62, ss. 2, 3 - - 1
See SOLICITOR. 2.
41 Vict. c. 16 - - - - 612
See ELEMENTARY EDUCATION. 2.
41 & 42 Vict. c. 31, ss. 8, 10 - - 139
See BILL OF SALE. 2.
—— —— s. 10, sub-s. 1 - - - 137
See BILL OF SALE.
43 & 44 Vict. c. 23 - - - - 259
See ELEMENTARY EDUCATION.
43 & 44 Vict. c. 42, s. 7 - - - 76
See MASTER AND SERVANT. 2.
—— —— s. 1, sub-s. 5 - - - 106
See MASTER AND SERVANT. 2.
—— —— s. 1 - - - - 357
See MASTER AND SERVANT. 4.
44 & 45 Vict. c. 41, s. 14 - - - 672
See LANDLORD AND TENANT. 4.

STAYING PROCEEDINGS—Cross actions 320
See PRACTICE. 12.

STOCK-BROKER—Sale of bank shares — Negligence - - - - 546
See NEGLIGENCE.

SUBSTITUTED SERVICE—Solicitor—Summons
See PRACTICE. 14. [598

SUMMONS—Substituted service on solicitor 598
See PRACTICE. 14.

SUPPORT—*Principal and Agent—Liability of Principal for Act done by Servant of Agent—Adjoining Owners, Liability of — Dangerous or hazardous Work.*] The defendant was the owner of a house standing at the corner of two streets, between a house belonging to the plaintiff and a house occupied by B. The defendant being desirous of rebuilding his house employed a competent architect and competent builders to rebuild it. The defendant's new house was a storey higher than the old house, and the basement was lower. After the house had been nearly finished, the workmen employed by the builders began to fix a staircase; in so doing they negligently and without the knowledge of the defendant or his architect, cut into a party wall dividing the defendant's new house and B.'s house. In consequence the defendant's house fell; and the girders having become displaced, injury was done to the plaintiff's house, for which he now sued the defendant. The fixing of the staircase was not in itself a hazardous operation, if it had been carried out with ordinary skill:—*Held* (by Baggallay and Brett, L.JJ., Holker, L.J., dissenting), that an action was maintainable against the defendant for the injury done to the plaintiff's house. *Bower* v. *Peate* (1 Q. B. D. 321) considered. PERCIVAL *v.* HUGHES - **C. A. 441**

VENDOR AND PURCHASER—*Purchaser's Knowledge of Defect of Title—Right to rescind.*] T. agreed to sell to C. certain freehold houses, and to make a good marketable title. On investigation of the title it appeared that the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, and the jury found that he did:—*Held*, affirming the decision of Lopes, J., that this evidence could not be admitted to modify the terms of the express contract, and that the plaintiff was entitled to recover. *Farebrother* v. *Gibson* (1 De G. & J. 602) and *Leyland* v. *Illingworth* (2 De G. F. & J. 248) distinguished. CATO *v.* THOMPSON - **C. A. 616**

2. —— *Vendor out of Possession — Right of Entry—32 Hen. 8, c. 9, s. 2—8 & 9 Vict. c. 106 s. 6—Measure of Damages—Sale of Land—Covenants for Title and quiet Enjoyment.*] Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by 8 & 9 Vict. c. 106, s. 6, nevertheless since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands.—A. sought to recover by ejectment certain lands; the person in possession, amongst other defences, alleged that one-fourth share thereof belonged to B., who had never been in possession. Thereupon A., for the sum of 10*l.*, took from B. a conveyance dated the 4th of July, 1877, of his share, containing covenants for title and quiet enjoyment. The actual value of B.'s share was 500*l.* A. then recovered possession of the lands. Before the date of the conveyance B. had been bankrupt, and after A. had recovered possession of the lands, B.'s trustees in bankruptcy recovered possession from A. of the one-fourth share which had been conveyed by B. to A. In an action by A. against B. for damages for breach of the covenants for title and quiet enjoyment:—*Held*, that the conveyance to A. from B. was not rendered void by 32 Hen. 8, c. 9, s. 2.—*Held*, also, that A. was entitled to recover from B. the sum of 500*l.* as damages. JENKINS *v.* JONES - - - - - **C. A. 128**

—— Conditions of sale—Approval of title 276
See PRACTICE.

—— Evidence—Intention of parties to conveyance - - - - - 506
See PRISON.

WATERWORKS COMPANY—*Water Rate to be calculated on "Rateable Value" — Waterworks Clauses Act*, 1847 (10 *Vict. c.* 17), *s.* 68.] By the special Act of a water company, which incorporated the Waterworks Clauses Act, 1847, save so far as the clauses or provisions thereof were expressly varied or excepted, the company were obliged to supply water to the occupiers of dwelling houses for domestic purposes at a rate not exceeding 6*l.* per cent. per annum upon the "annual rack rent or value" of the premises supplied. It was further provided in a subsequent section of the Act that the rate should be "payable according to the annual value at which the premises were from time to time assessed to the poor-rate if the same were so assessed, or if not, according to the net annual value of the premises."—By the 68th section of the Waterworks Clauses Act, 1847, "the water rates, except as hereinafter and in the special Act mentioned, shall be payable according to the annual value of the tenement supplied with water":—*Held*, that the water rate charged by the company must be calculated on the "rateable value" not on the "gross estimated rental" of the premises supplied with water. WARRINGTON WATERWORKS COMPANY *v.* LONGSHAW - - - - - - - 145

2. —— *Water Rate to be calculated on "Rateable Value."*] A water company were by their special Acts compelled to supply water to occupiers of dwelling houses for domestic purposes at the following rates, viz. "where the 'annual value' of the dwelling house shall not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*, and where such 'annual value' should exceed 200*l.*, at a rate per cent. per annum on such value not exceeding 3*l.*"—It was also provided by their special Act (9 Geo. 4, c. cxl., s. 27), that the water rate was to be payable "according to the actual amount of the rent of the premises where the same could not be ascertained according to the actual amount or annual value upon which the assessment to the poor-rate was computed."—In a case where there was no actual rent paid within the meaning of the Act, the occupier being lessee of the house for a long term at a ground rent:—*Held*, that the water rate must be computed on the "rateable value" of the premises supplied with water as appearing from the poor-rate assessment, not upon the "gross value." DOBBS *v.* GRAND JUNCTION WATERWORKS COMPANY - - - - - - - 151

WILL—"*Issue and their Heirs*"—*Gift over on Death without leaving Children—Estate for Life or Estate Tail.*] The owner of land devised it to his eldest son L. "for life, and after his decease to his lawful issue and their heirs for ever, if any," and "if he should die without leaving any children born in wedlock" then to the testator's son E. and his heirs:—*Held*, affirming the decision of Cave, J., that the devise gave a life estate only to L., and not an estate tail. MORGAN *v.* THOMAS [C. A. 643

WORDS—"Adjoining or abutting on" - 183
See LOCAL GOVERNMENT ACTS.
—— "Annual value" - - - 145
See WATERWORKS.
—— "Desertion" - - - - 522
See POOR LAW.
—— "Decision" - - - - 600
See LOCAL GOVERNMENT ACTS. 3.
—— "Free from capture and seizure" - 463
See INSURANCE (MARINE).
—— "Issue and their heirs" - - 643
See WILL.
—— "Lodger" - - - - 245
See LANDLORD AND TENANT. 6.
—— "Port" - - - - - 679
See SHIP.
—— "Tolls" - - - - - 744
See RAILWAY.

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